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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LUELLA BREEN, ET AL.,

Petitioners,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Where the Secretary of Labor has determined, in an informal rulemaking proceeding, that a 1942 regulation which had prohibited homework in the knitted outerwear industry is no longer necessary to his enforcement of the Fair Labor Standards Act (FLSA):

1. May the Secretary's decision to rescind the regulation -- and thereafter to regulate such homework in the same manner as in most other industries -- based upon his predictive judgment, in light of the absence of available empirical data, regarding his Department's enforcement capabilities, be struck down under the Administrative Procedure Act because the reviewing court disagrees with that predictive judgment?

2. Does the APA require, and does the FLSA authorize, the Secretary to

consider alternative forms of homeworking prohibition, where he has already reasonably concluded that prohibition does not serve the purposes of the FLSA?

Where the only harm alleged by plaintiff labor unions would result from the illegal acts of unnamed third parties who may choose to violate the FLSA by paying subminimum wages:

3. Are plaintiffs' unsupported and speculative allegations that their members will suffer a competitive loss of wages, but not at a level below the minimum wage, sufficient to confer standing to challenge a rulemaking which does not alter the FLSA proscription against subminimum wage payments?

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] respectfully pray that

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1 This petition is filed on behalf of Luella Breen, Cecile Duffany, Mary Hon, and Linda Guetti, present or former homeworkers in the knitted outerwear industry, who were defendant-intervenors below. Respondents, plaintiffs below, are the International Ladies' Garment

a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on November 29, 1983, following the opinion of that Court entered on the same date. The opinion declared that the decision of the Secretary of Labor, rescinding a regulatory prohibition against the employment of homeworkers in the knitted outerwear industry, was arbitrary and capricious.

OPINIONS BELOW

The opinion of the United States

Footnote Continued

Workers' Union, and other unions, manufacturers, and manufacturers' associations in the garment industry, and state labor officials in New York and California. A complete listing of plaintiff-respondents appears as Exhibit A, appended to this petition.

Court of Appeals for the District of Columbia Circuit, dated November 29, 1983, is reported at 722 F. 2d 795 (D.C. Cir. 1983). Appendix, 1. The opinion of the United States District Court for the District of Columbia, dated July 23, 1982, is not reported. Appendix, 67.

JURISDICTION

Respondents brought this action in the United States District Court for the District of Columbia seeking a declaration that the Secretary of Labor acted arbitrarily and capriciously in rescinding the homeworker ban. Appendix, 104. On cross-motions for summary judgment, the District Court found that plaintiffs had standing to sue, and upheld the rulemaking. The United States Court of Appeals for the

District of Columbia Circuit, on appeal, then vacated the Secretary's rescission of the regulation. Petitioners here, defendant-intervenors below, petitioned for rehearing or for rehearing en banc. Both requests were denied on February 1, 1984, and on February 29, 1984, the judgment of the Court of Appeals was conveyed to the District Court. Appendix, 66.

This petition is being filed within 90 days of the date of denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, Section 2, of the United States Constitution:

> The judicial Power shall

> extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and ....to controversies to which the United States shall be a party....

Pertinent portions of the Fair Labor Standards Act, 29 U.S.C. §§202 and 211(d), and the Administrative Procedure Act, 5 U.S.C. §§553(c), 702, and 706(2)(A), appear as Exhibit B, appended to the petition. Pertinent portions of the Labor Department regulations adopted pursuant to the Fair Labor Standards Act, 29 CFR Part 530, are reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioners, homeknitters in rural Vermont, seek review of the judgment of the United States Court of Appeals, Appendix, 65, vacating a Labor Department

informal rulemaking that had permitted homeworking employment in the knitted outerwear industry, rescinding a regulation promulgated in 1942 which had prohibited such work.

While "homework" has always been legal in every other industry, although regulated by the Department of Labor to ensure compliance with the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, et seq., the Secretary of Labor in the early 1940's banned homework with respect to the knitted outerwear trade and six other industries.[2] 29 CFR §§530.1, 530.2. The

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[2] The seven "restricted" industries -- in which homeworking is, with only rare exceptions, 29 CFR §§530.2, 530.4, prohibited -- are as follows: knitted outerwear, women's apparel, jewelry, gloves and mittens, buttons and buckles, handkerchiefs, and embroideries. 29 CFR Part 530; Appendix, 146. No industries have been added to or removed from this listing, other than by the 1981

homework prohibition was effected pursuant to specific authority granted to the Secretary under the FLSA. See, Gemsco v. Walling, 324 U.S. 244, 269 (1945). That authority extends only to such restrictions or prohibitions "as are necessary or appropriate" to prevent the circumvention or evasion of the minimum wage rate prescribed by the Act. 29 U.S.C. §211(d).

On December 5, 1980, the Department announced hearings to determine whether the homework prohibition was still "necessary or appropriate" to safeguard the minimum wage. 45 Fed. Reg. 80555 (Dec. 5, 1980), Appendix, 157. Following public hearings, the Department on May 5,

Footnote Continued

rulemaking at issue herein, which removed only the knitted outerwear industry.

1981, published a proposal to lift the homework ban in all seven of the restricted industries. 46 Fed. Reg. 25108 (May 5, 1981), Appendix, 161. The Notice referenced the purpose of the rulemaking:

> to determine if Regulations 29 CFR Part 530 -- Employment of Homeworkers in certain industries, are still necessary or appropriate to safeguard the minimum wage rate..., and whether there is need to change the Regulations to take into account changes in economic conditions which have occurred since the homework Regulations were promulgated.

46 Fed. Reg. at 25108, Appendix 161. The proposed rulemaking was based in part on testimony which "raised serious questions as to the effectiveness of the Regulations in protecting workers." 46 Fed. Reg. at 25109, Appendix, 165. The Department concluded:

> To the extent that minimum wage and overtime violations presently exist in the seven restricted industries,... elimination of the Regulations would make it more likely that homeworkers employed in these industries would report such violations without fear of losing their employment.

Id., Appendix, 165.

On October 9, 1981, after two previous notices in the Federal Register, four days of public hearings, and review of over 10,000 comments, the Secretary of Labor published a Final Rule removing the regulatory prohibition against homeworking in only one of the seven restricted industries -- the knitted outerwear industry. 46 Fed. Reg. 50348 (Oct. 9, 1981), Appendix, 167. As a result, homeworking employment in that industry was placed on the same footing as almost every other -- it was to be

regulated, rather than prohibited. In the six other restricted industries, however, the homework employment prohibition remains in effect.

The Final Rule was based upon testimony that homeworkers in the knitted outerwear industry are paid in excess of the minimum wage; upon the absence of "adequate substantiating evidence" that removal of the restriction would result in significant harm to factory employees in the industry; upon evidence demonstrating that "substantial curtailment of employment opportunities and earning power" would result from a continuation of the restriction; and upon a specific finding that "an effective enforcement program [ensuring payment of the minimum wage] is feasible." 46 Fed.

Reg. at 50348-50349, Appendix, 171-173.

The conclusion that a program for enforcing the minimum wage is feasible -- the issue at the very crux of the instant litigation -- was in turn supported by a new "concerted compliance effort," and a finding that homeworkers are expected to comprise only a small percentage of the employees in the industry. The Secretary distinguished the current state of enforcement feasibility from that in 1942, when the restriction was first imposed. Forty years ago effective enforcement was not deemed possible because homeworkers comprised an estimated 20 percent of the workforce, because the Department's enforcement program was newly established, and because acceptance of the principle of a

national minimum wage, then only recently created by the 1938 statute, was far less prevalent than today. 46 Fed. Reg. at 50349, Appendix, 173.

The Final Rule also emphasized the experimental nature of the Secretary's approach, specifically stating that if significant minimum wage or other violations were found to be widespread among homeworkers, the Secretary would consider reimposing the restriction. Conversely, if specific evidence were found to support the removal of the prohibition, the Secretary would consider its removal in the six remaining restricted industries. Id., Appendix, 173-74.

The International Ladies' Garment Workers' Union (ILGWU) and others brought

suit in the U.S. District Court for the District of Columbia, challenging both the authority of the Secretary to remove the prohibition, and also the correctness of his decision to have done so. The Court allowed the petitioners here to intervene as defendants, and granted summary judgment for the defendants. Appendix, 103. Although the plaintiffs were held to have standing to sue, the Court concluded that the Secretary did have authority to lift the prohibition, and that his action was properly supported by the record, agency experience, and his own discretionary judgment, and was rationally based and procedurally correct.

On appeal the Court of Appeals for the District of Columbia reversed,

holding that the decision of the Secretary was arbitrary and capricious for three separate and independent reasons. Appendix, 43, n. 43. The Court found that the Final Rule failed to evidence the Secretary's consideration of all "common and known or otherwise reasonable options" to the complete rescission of the homeworking ban, Appendix, 43; that his conclusion regarding the feasibility of an effective enforcement program was "unreasoned," Id.; and that he failed to give adequate consideration to whether resultant employment benefits to homeworkers might be offset by "employment losses and reductions in the earning power of factory workers." Appendix, 60-61. The case was remanded to the District Court

with instructions to return the matter to the Secretary for further proceedings.[3]

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[3] The subsequent history of the dispute is also of some interest. After the decision of the Court of Appeals, the Secretary on March 27, 1984, published two items: a new Notice of Proposed Rule, similar to the one at issue herein, proposing to remove the homeworking prohibition as to the knitted outerwear industry alone, 49 Fed. Reg. 11786 (March 27, 1984); and an Emergency Rule, pursuant to 5 U.S.C. §§553(b)(B) and 553(d)(3), immediately authorizing homework in the industry for a period of 120 days for those persons engaged in homeworking after the 1981 rescission. 49 Fed. Reg. 11792 (March 27, 1984). The emergency measure has again been challenged by the ILGWU as a violation of the Court of Appeals mandate in the instant litigation. Following the District Court's denial of injunctive relief on April 11, 1984, the matter is now before the Court of Appeals.

Despite the new rulemaking, the petition for certiorari has by no means been mooted. For reasons similar to those relied upon by this Court in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 535 n. 14 (1978), there remains a very real case or controversy before this Court. The outcome

Footnote Continued

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of the rulemaking itself is not certain, and of even greater consequence is the continuing impact of the Court of Appeals ruling on this matter. Throughout the inevitable future litigation over the Final Rule, Plaintiff/Respondents ILGWU, et al., will be held to have standing to sue, and the Secretary of Labor will be required to satisfy the Court's demands on the issues of enforcement feasibility, consideration of alternatives, and consideration of the earning capacity of factory workers. Petitioners argue, infra, that on the first point the Court has imposed too great a standard on the Secretary, and on the second and third it has entirely created standards neither called for in, nor indeed consistent with, the Fair Labor Standards Act and Administrative Procedure Act.

The questions raised are of particular significance, given that the Court of Appeals for the District of Columbia Circuit is the venue for the great majority of cases challenging administrative agency action. Its broad grant of standing to sue under the APA in this case; its extension of the alternatives review requirement set forth in such carefully limited fashion by this Court in Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Company, ___ U.S. ___, 103 S. Ct. 2856 (1983); its exceedingly restrictive view of an agency's power to

Footnote Continued

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determine its own enforcement capabilities and to alter its methods accordingly; and its novel reading into the FLSA of a balancing test for economic impacts on factory versus home workers, will hereafter serve as far-reaching precedent for judicial review of agency actions. The importance of these issues argues strongly in favor of this Court's determination of the continuing "case or controversy" which is presented.

MEANING OF THE DECISION BELOW

The decision below thus defeats a policy choice made by the Secretary of Labor to modify the enforcement technique utilized in a single industry, from that of outright prohibition to that of regulation, the mechanism considered reasonable and appropriate as applied to almost every other industry. Thus, in the face of the outdated nature of the 40-year-old regulation at issue, evidence in the agency record supporting the Secretary's policy choice, the conscious decision of the Secretary to couple removal of the prohibition with an increased enforcement effort, and the declaration that the regulatory change is to be considered experimental, the Court of Appeals substitutes its preference in

an area of agency discretion for that of the Secretary.

The FLSA is thereby re-written to defy the express limitations of §211(d) placed by Congress upon the authority of the Secretary to prohibit homeworking, and to remove from the Secretary considerable latitude in determining enforcement policy for his agency. The Administrative Procedure Act is likewise re-written to engraft upon the rulemaking process a more rigorous requirement of alternatives review appropriate to agency decisions under such statutes as the National Environmental Policy Act, 42 U.S.C.S. §4321, et seq., where the substantive statute itself demands it. And the requirements of standing under Article III and related prudential

considerations are re-written to extend jurisdiction to cases in which the injury claimed by plaintiffs is not only speculative, but is also caused only by the independent and illegal conduct of third parties not before the Court.

The decision below, because of its mis-application of the law, and of this Court's rulings in Valley Forge Christian College v. Americans United for a Separation of Church and State, 454 U.S. 464 (1982), and in Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., ___ U.S. ___, 103 S. Ct. 2856 (1983), threatens very real and practical ramifications for all future federal administrative actions, and for the jurisdiction and scope of review of federal courts. For

administrative agencies which choose to reexamine existing regulations and to determine appropriate enforcement strategies for the 1980's, the decision establishes a presumption in favor of existing rules as both a factual and judgmental benchmark which current administrators must overcome before outdated rules can be modified or eliminated.

The administrative dilemma created by the decision below is exemplified in the case itself. Because the homeworking prohibition has been in effect for forty years, it would not be possible -- in the absence of the very sort of experimental program proposed by the Secretary here and struck down by the Court of Appeals -- to satisfy the data requirement

imposed by the Court, and to overcome the presumption in favor of the 1942 regulation.

ARGUMENT

I. PLAINTIFF-RESPONDENTS LACK STANDING TO CHALLENGE THE SECRETARY'S ACTION

The power conferred by the Constitution upon the federal judiciary is not an unconditional authority to declare the rights of individuals. A federal court's power may be exercised only when necessary to determine a "real, earnest and vital controversy" and even in that instance only as a means of last resort. Chicago & Grand Trunk Railway Co. v. Wellman, 143 U.S. 339, 345 (1892).

Such a limitation upon the power of the federal judiciary was drawn in part as an acknowledgment of the proper role of the judicial branch in the constitutional

structure, because the exercise of that power inevitably affects relationships between coequal branches of the national government. Warth v. Seldin, 422 U.S. 490, 498 (1975). A federal court may not, therefore, entertain a claim that another branch has conducted itself improperly, unless the claimant's interests are so affected as to entitle that claimant to raise it. Blair v. United States, 250 U.S. 273, 279 (1919).

This concept of judicial self-restraint, constitutionally expressed through the "cases and controversy" requirement of Article III, and supplemented by various prudential considerations, has found voice in the development of the standing doctrine, reviewed recently by this Court in Valley

Forge Christian College v. Americans United for a Separation of Church and State, 454 U.S. 464 (1982). The Court articulated the conditions which under Article III must be present in order for federal court jurisdiction to be invoked. The plaintiff must demonstrate: (1) that he personally has suffered some actual or threatened injury as a result of defendant's putatively illegal conduct; (2) that said injury can fairly be traced to the challenged action; and (3) that the alleged injury is likely to be redressed by a favorable decision of the court. Id., 454 U.S. at 472-73. Federal courts have also imposed further prudential limitations upon the exercise of their power, including the requirement that the plaintiff's complaint must fall within the

zone of interests intended to be protected by the statute under which suit is brought. Data Processing Service v. Camp, 397 U.S. 150, 153 (1970).

A. ILGWU Fails to Demonstrate the Necessary Connection Between the Defendant and The Alleged Injury.

The standing of plaintiff-respondents, ILGWU, et al., ("ILGWU"), in this matter rests entirely upon a causal connection between the contested rulemaking and the alleged injury to ILGWU which is far too distant, slight, and speculative to warrant federal court jurisdiction. The amended complaint offers a Rube Goldberg-like vision of the labor market, where a limited rulemaking which simply removes a ban on homeworking, through some series of leaps

of both faith and logic, becomes a loss of jobs and earning capacity to persons not even encompassed by the rulemaking which is at issue. Appendix, 104, 126-130.

The Court of Appeals, by misconstruing the nature of the rule itself, has eliminated most of the necessary intervening links between the rulemaking and the alleged injury to ILGWU. According to the Court:

> In contrast [to cases holding plaintiffs' claim based upon the independent actions of third parties to be too speculative], the relief sought by appellants would make the injurious conduct of third parties complained of in this case illegal;...

Appendix, 28 (emphasis supplied). Such is simply not the case. The injurious conduct complained of -- the payment by

third parties of subminimum wages -- always has been, and would clearly remain under the final rule, illegal. Far from removing the illegality of subminimum wage payments, the Secretary declares in his Notice an intensified enforcement effort as to homeworkers in the knitted outerwear industry.

Article III demands a more direct nexus between the action complained of and the injury alleged, a requisite link which has been previously expressed in terms of a "but-for" test. See, Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 74-75 (1978). In order to establish standing, therefore, ILGWU must at a minimum demonstrate that, "but for" the removal of the prohibition on homework in the knitted outerwear

industry, subminimum wage payments to homeworkers would not be made. The flaw in this contention, however, is that it omits a necessary link in the chain of causation. The direct result of the removal of the prohibition on homework by the Secretary is not payment of subminimum wages, but rather employment of homeworkers. It is only the independent and illegal action of third parties -- homeworker employers who may choose to violate the FLSA -- which will result in subminimum wage payments.[4]

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[4] In fact, the final rule and the agency record suggest that the Court of Appeals ruling may have the opposite effect from that intended, by inhibiting the reporting of illegal subminimum wage payments to homeworkers. See, Notice of Proposed Rulemaking, Appendix, 165. Such violations, even despite the homework prohibition, were at least alleged, in the Labor Department's action against C.B. Sports, Inc., although they were never proved or admitted. Both the

[A] federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). The injury alleged by ILGWU can be traced only to such third parties, and does not fairly follow from the rulemaking at issue.[5]

An examination of the rationale of

Footnote Continued

illegality and the Department's duty to respond have long pre-existed the rulemaking, and remain wholly unaffected by it.

[5] The Court of Appeals itself characterized violation of the law by payment of subminimum wage as an "extraordinary measure," and therefore not within the realm of reasonable actions for which a party must account when seeking standing. Appendix, 28.

the Court of Appeals from a different perspective underscores the same defect. The standing doctrine demands that the injury alleged be redressable by the relief sought, else a federal court will serve as little more than a forum for public debate. See, Sierra Club v. Morton, 405 U.S. 727, 740 (1972). Judicial invalidation of the final rule, which itself in no manner alters the illegality of subminimum wage payments, will in no sense prevent such illegal actions by independent third parties. In the absence of the necessary causal link between rulemaking and injury, the Court is powerless to do anything but illegitimize even those homeworkers and their employers who would operate within the bounds of the FLSA. Since the relief

requested cannot redress the injury alleged, ILGWU must be found to lack standing to invoke federal jurisdiction. Valley Forge, 454 U.S. at 472.

B. The Injury Alleged by ILGWU Does Not Lie Within the Zone of Interests Intended to Be Protected by the Fair Labor Standards Act.

The Court of Appeals summarily "reject[s] the suggestion that the manufacturers, manufacturers' associations and labor organizations do not satisfy the zone of interests test in this case," Appendix, 25, based only upon a previous determination that compliant employers have a cause of action under §10 of the APA. 5 U.S.C. §702 (1982). Appendix, 16-24. Plaintiffs who are state labor officials, labor unions and manufacturer associations, however, are

in far too attenuated a posture relative to the statutory scheme constructed by the FLSA to satisfy the prerequisites for standing.

The purpose of the FLSA is to protect both employees who are paid subminimum wages, and also employers who are competitively disadvantaged because of such payments. 29 U.S.C. §202. The statute authorizes only employees who are being paid subminimum wages themselves, or the Secretary acting in their behalf, to bring an enforcement action. 29 U.S.C. §216(b), (c). Thus, as a threshold matter, ILGWU and its co-plaintiffs are not authorized to enforce the rights of homeworkers who allegedly will be paid subminimum wages.

To the extent that ILGWU alleges

that union members will suffer "reductions in their wages and other terms and conditions of employment", Appendix, 127, such claims also fall outside the zone of interests protected by the statute. The FLSA guarantees that a minimum standard will be upheld; it does not guarantee, nor does it authorize enforcement of, any labor conditions beyond that minimum standard. 29 U.S.C. §202(a). It is nowhere alleged that factory employees will be paid any less than the minimum wage, merely that their wages will be reduced because of competitive market forces. Such injury, whether real or imagined, is neither contemplated by, nor sufficient for standing under, the FLSA. The FLSA is similarly unconcerned with the alleged

effect on the unions' organizing ability, Appendix, 128, and with the other injuries alleged by the plaintiffs herein. Appendix, 128-30.

II. THE SECRETARY ENGAGED IN REASONED DECISION-MAKING IN COMPLIANCE WITH THE APA

The Court of Appeals identified three independent[6] bases for its decision: (1) the record failed to support the Secretary's conclusion regarding the feasibility of an effective program to enforce the FLSA among

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[6] While the Court found the failure adequately to consider alternatives to be the clearest basis for reversal, it also held as independent justifications its conclusions regarding enforcement feasibility and the curtailment of employment opportunity. Appendix, 43, n. 43. The precedent established by this case, then, would hold any one of the Court's reasons sufficient to overturn agency action.

homeworkers in the knitted outerwear industry; (2) the Final Notice failed to adequately address certain alternatives to rescission of the homeworking ban; and (3) the Secretary failed to consider the detriment to the employment opportunity and earning power of factory workers from removal of the prohibition. Petitioners submit that on each count the Court of Appeals erred in its application of the relevant law, and established a new and wholly unauthorized standard for judicial review of an informal agency rulemaking.

A. Where There is a Rational Basis for Rescission, a Reviewing Court May Not Accord to an Existing Regulation a Presumption of Validity Which Must be Overcome By the Agency.

The Court of Appeals correctly articulated the "arbitrary and

capricious" standard of review for informal notice-and-comment rulemaking under the Administrative Procedure Act. 5 U.S.C. §706(2)(A). In actuality, however, it held the Secretary to a far more rigorous test than that required by law. This Court has previously rejected an attempt to intensify the scope of review of agency action based upon a reviewing court's reading of certain "legislative acts and non-acts." Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., ___ U.S. ___, 103 S. Ct. 2856, 2867 (1983). There, even an "unequivocal ratification" of an agency regulation by Congress was held not to alter the "arbitrary and capricious" standard of review of a later agency decision to

rescind the regulation. Id. 103 S. Ct. at 2868. By the same token, an agency decision to revoke a regulation may not be reviewed under a more stringent standard simply because of a previous administrative action -- viz., a prior administrator's decision to have promulgated the regulation in the first place. Such is the basis underlying the Court's heightened scrutiny of the Secretary of Labor.

The Court of Appeals has accorded a presumption of validity to the administrative decision made in 1942 to adopt the homework prohibition. Seizing upon language in Motor Vehicle Manufacturers Association, 103 S. Ct. at 2866, the Court applies the presumption in an evidentiary sense, requiring the

Secretary to carry a burden of proof sufficient to overcome the presumption. The entire factual and judgmental benchmark against which the Court measures the Secretary's 1981 decision is another administrator's policy choice made forty years previously. ("We do not believe that the Secretary was free to ignore the specific impediments identified in the 1942 findings,..." Appendix, 60)

Any presumption properly accorded is, however, only against policy changes that "are not justified by the rulemaking record." Motor Vehicle Manufacturers Association, 103 S. Ct. at 2866. Where justification does exist, as measured only by the rational basis standard of the APA, a reviewing Court may not employ an outdated administrative policy

decision as a barrier to regulatory change. To do so would be to inhibit agencies' necessary latitude to "adapt their rules and policies to the demands of changing circumstances." Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968).

B. The Agency's Predictive Judgment as to its Own Enforcement Capabilities Is Adequately Supported in the Record, and May Not Be Struck Down Because of the Absence of Specific Data.

An administrative agency, in order to respond to the need for expertise and specialization in a complex society, must be permitted to exercise its delegated discretion supported by experience without undue restrictions. See, SEC v. Chenery Corp., 322 U.S. 194, 209 (1947). Consequently, not only must "a reviewing

court...be most hesitant to intrude" upon an area reserved to an agency's expertise, Motor Vehicles Manufacturers Association, 103 S. Ct. at 2872, but also the judgment of an administrator may not be overturned simply because a reviewing court would reach a different conclusion. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

It is, moreover, a truism that in many instances an agency will not be able to anticipate with complete certainty the full effects of its policy choices. Thus, this Court has "recogniz[ed] that policymaking in a complex society must account for uncertainty." Motor Vehicles Manufacturers Association, 103 S. Ct. at 2871. When reconsideration of past policy options results in "substantial

uncertainty" that a regulation currently continues to accomplish its intended statutory purpose, and such uncertainty is supported by the record and reasonably explained, then the agency must be free to alter or revoke that regulatory standard.

> It is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.

Id. And see, FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-95 (1981). Conclusions, particularly in the area of regulatory policy, often require "forecast[s] of the direction in which future public interest lies [and] necessarily involves deductions based on the expert knowledge of the agency."

Those deductions are deserving of a reviewing court's deference. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978), quoting, FPC v. Transcontinental Pipe Line Corp., 365 U.S. 1, 29 (1961).

The Court of Appeals herein evinces an unwillingness to recognize that circumstances in the nation's labor markets do change over time, and that the Secretary of Labor has been granted authority by Congress to respond to such changes. As a result, the Court required the Secretary to in some manner duplicate or repudiate the studies of the early 1940's which led to the original prohibition.[7] In 1940 homeworking in the

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[7] Based on the 1942 findings, the Appeals Court faults the Secretary's estimate of the projected homeworker population, the failure to articulate

knitted outerwear industry was commonplace and constituted a significant portion of the industry workforce. Appendix, 173. In 1981, by contrast, such homeworking had been illegal for over forty years. While there were isolated instances of homeworking in violation of the ban,[8] there was no

Footnote Continued

differences between enforcement in urban and rural areas, and "other impediments to enforcement of the Act which were 'inherent in the homework practice' in 1942." Appendix, 53-60.

[8] Although the Court of Appeals finds some significance in the action against C.B. Sports as support for the 1942 decision, Appendix, 48-49, that litigation more properly argues against the wisdom of the prohibition. C.B. Sports demonstrates two important factors: that despite an absolute prohibition, homeworking in the knitted outerwear industry continued because the need for this type of employment opportunity remained; and that the Department of Labor is well able to enforce the FLSA as to homeworking employees.

history of permissible homework in the industry from which reliable data could be derived concerning the potential number of homeworkers under a system of regulation, the likelihood of minimum wage violations, and the feasibility of a heightened enforcement effort. The Court of Appeals also overlooks the fact that the conclusions arrived at by the Secretary in 1942 were the very type of enforcement policy options -- based on agency discretion and prudent forecasting -- that the Court today condemns.[9]

The decision of the Secretary to remove the homeworking ban was not

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[9] Ironically, the only data considered reliable by the decision below is the information which has been collected as a result of the Labor Department's enforcement actions since 1981, when the prohibition was lifted.

rendered in an evidentiary vacuum. The Labor Department engaged in an open and public rulemaking process, and considered over 10,000 public comments. There was substantial evidence supporting the Secretary's conclusion: an Illinois Department of Labor study, conducted in 1980, which concluded that homeworking prohibitions were discriminatory; an affidavit by Arthur H. Korn, Chief of the Wage and Hour Division's Branch of Special Minimum Wages, that violations of the minimum wage were no more pervasive in restricted than in non-restricted homeworking industries; a 1959 Department of Labor study on homeworking which supported the Secretary's decision to lift the prohibition; and the testimony of a number of individuals who are

homeknitters in Vermont and favor the removal. The Secretary relied also upon such factors as the Department's knowledge and expertise with regard to the general level of acceptance of the minimum wage throughout the nation's labor markets, his own authority to control the agency's enforcement efforts, and undoubtedly also upon the agency's enforcement experience with homework in all other regulated industries. He initiated a new and concentrated enforcement program in conjunction with the rulemaking, and specifically characterized the new regulatory regime as experimental in nature. Should it ultimately compromise his responsibilities under the Fair Labor Standards Act, the Secretary affirmed that the ban

would be reimposed. Appendix, 173.

Rather than acknowledging the probative value of this evidence as adequate support for the Secretary's decision, and deferring to his expertise, judgment and discretion in accordance with the mandate of Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), the Court of Appeals substitutes its own judgment and interpretation of the evidence relied upon by the Secretary. It then applies its more rigorous "presumption" standard to conclude that the absence of current supporting data as reliable and persuasive as the 1942 report requires the rule to be struck down. In so doing, the Court evidenced a misguided view of the requirements of the APA, and has

intruded its own substantive judgment into an area properly left to an agency's expertise.

C. An Agency Rulemaking Need Not Consider Policy Alternatives Which Do Not Further the Statutory Purpose.

The primary basis for the decision of the Court of Appeals -- and one again held to be independent of the other rationales cited, Appendix, 43 n. 43 -- was the Secretary's failure to consider, and to explain his rejection of, alternatives to the complete removal of the prohibition. The Court cites as support for this conclusion Motor Vehicle Manufacturers Association, 103 S. Ct. 2856 (1983). In so doing, however, it has improperly construed the application of that precedent and, as a consequence,

has expanded the role of a reviewing court far beyond that contemplated by this Court and by the APA.

The range of alternatives which the Secretary should, according to the Court of Appeals, have considered is by no means clear. While the discussion primarily addresses two "possible choices [which] were identified in the Department's Notice," Appendix, 37, the Court apparently would demand more of the Secretary than the consideration of even those two. The Court of Appeals asserts that an agency rulemaking is fatally flawed unless it duly considers, and adequately explains the reasons for rejecting, all "obvious alternatives," Appendix, 40 n. 41, all "obvious and potentially viable alternatives," Id., all alternatives which are not "uncommon

or unknown," Appendix, 41, and all "common and known or otherwise reasonable options." Appendix, 43.

In so holding, the Court of Appeals has erred in two respects. It has, in the first instance, grafted onto the APA a far more extensive requirement of alternatives analysis -- one more appropriate to agency action pursuant to a statute such as the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, which substantively requires consideration of alternatives -- than is properly required of agency action construed under the standard of a "reasoned statement of basis and purpose."

And second, the decision below misinterprets the FLSA in finding the

homework prohibition and its variants, in light of the Secretary's conclusion that the ban is not necessary to enforcement of the minimum wage, to be "narrower options" than the choice made. Appendix, 39 n. 39. Given the FLSA's express limitation, in §211(d), upon the Secretary's authority to prohibit homework, the choice to enforce the statute by regulation is an option significantly more narrow than any version of prohibition. The Court of Appeals would have the Secretary consider alternatives far broader in scope than the option chosen.

The instant case represents the obverse of Motor Vehicles Manufacturers Association, and the Court of Appeals has failed to recognize the distinction.

This Court, careful to narrow the application of its ruling, held that when an agency proposes to rescind a regulation which indisputably furthers the purpose of the substantive statute, its failure first to consider a less far-reaching technological alternative, where the viability of said alternative has not been drawn into question, is arbitrary and capricious. 103 S. Ct. at 2871. Had the agency there reasonably concluded that passive restraints would not result in fewer highway fatalities, its rulemaking clearly would not have been overturned for failure to consider other varieties of passive restraints. The opinion cautions, moreover, that its holding is not to be read as requiring an agency to engage in any specific

procedures or to consider all alternatives, and evinces a particular sensitivity to agency prerogatives on matters of policy. Id. 103 S. Ct. at 2870-71.

In order to reach its decision in the instant case, the Court of Appeals was required to read the holding of Motor Vehicles Manufacturers Association far too expansively. It is now, as a result, the unlikely law of the District of Columbia that an agency may not rescind a regulation which has reasonably been found not to further the statutory purpose, without first considering narrower versions of the unsuitable rule. This result obtains despite the clear limitation placed upon the Secretary's authority to prohibit homework. 29 U.S.C. §211(d). Even where he has

properly found the prohibition to be neither "necessary" nor "appropriate" to the maintenance of the minimum wage, the Court of Appeals would have the Secretary consider lesser forms of prohibition prior to removing the unauthorized regulation. The FLSA, however, in §211(d) precludes the Secretary from adopting any such alternative.

The analysis applied by the Court of Appeals is also far more intrusive than that of the other Circuits. Clearly, an agency decision will not be upheld under the APA where "[t]here are no findings and no analysis...to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion." Id., 103 S. Ct. at 2869, quoting Burlington Truck Lines v. United

States, 371 U.S. 156, 167 (1962) (emphasis supplied). However, it is equally true that the APA requirement of "a concise and general statement of basis and purpose" may not serve as a technical obstacle to strike down agency action. See, Alabama Association of Insurance Agents v. Board of Governors, 533 F. 2d 224, 236 (5th Cir. 1976). This provision "does not require an agency to supply specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." National Nutritional Foods Ass'n v. Weinberger, 512 F. 2d 688, 701 (2d Cir. 1975). The APA was not intended to create obstacles, but rather to facilitate rulemaking, and thus if a reviewing court "can discern the path of the [agency] with sufficient confidence,"

the requirements of the APA have been met. Alabama Association, 533 F. 2d at 237.

In the context of the instant case the agency's path is clearly discernible. As a result of the specific limitation placed upon the Secretary's authority by Congress in §211(d) of the Act, the substantial evidence received in support of rescission, and the deference properly accorded an exercise of agency discretion, particularly on a matter of enforcement policy, it must be concluded that the Secretary acted prudently and correctly. The final rule adequately stated the "basis and purpose" for his decision, and consideration of other alternatives would not have furthered the purpose of the Act.

D. The FLSA Does Not Require or Permit Consideration of the Impact of Rescission on the Earning Capacity, Above the Minimum Wage, of Factory Workers.

The third ground for the Court of Appeals decision again imposes on the Secretary a requirement nowhere present in the FLSA. The Court would apparently have the Secretary apply a balancing test, weighing the employment opportunities for homeworkers resulting from removal of the prohibition against the resultant economic injury to factory workers.[10] Such injury, it was

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10 The Court's analysis of the Secretary's treatment of employment opportunities bespeaks its excessively crabbed reading of the Final Rule. The Court chooses to read unnecessary and unwarranted ambiguity into the Secretary's finding, questioning whether the threatened employment opportunities were the existing illegal positions or anticipated additional opportunities, or

suggested, would take the form of reduced factory wages and employment caused by the competitive impact of homeworkers. By requiring the Secretary to base his decision on "net...employment opportunities," Appendix, 62, the Court has again misconstrued the FLSA, both in its statement of purpose and in the express limitation of §211(d).

It is the declared policy of the FLSA to eliminate "labor conditions

Footnote Continued

whether somehow none were "affected" by the prohibition. Appendix, 61. It is clearly the impact upon both existing illegal positions, brought to light and hence jeopardized in the rulemaking process, and upon potential new positions of homework employment previously inhibited by the ban, which concerned the Secretary. To find fault with his failure to state in explicit terms the obvious is indicative of the Court's unduly critical reading of the Final Rule.

detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. §202(a). The purpose of the Act is to establish and enforce national minimum wage and maximum hour requirements. United States v. Darby, 312 U.S. 100, 109-110 (1941) (and legislative history cited). Beyond the "minimum standard of living" assured by the statute, the Secretary is without authority to determine or otherwise to alter the economic conditions created by a free market economy. He is directed to eliminate substandard labor conditions "as rapidly as practicable...without substantially curtailing employment or earning power." 29 U.S.C. §202(b). And see, Opp Cotton Mills, Inc. v.

Administrator, 312 U.S. 126, 143 (1941).

The homeworking ban was promulgated out of a finding that in 1942 the Department could not ensure payment of the minimum wage to homeworkers. In accordance with the statutory directive of §211(d), therefore, the Secretary was constrained to protect the newly enacted minimum wage, even at the expense of curtailing employment opportunities for homeworkers. Once the Secretary in 1981 reasonably determined that minimum wage enforcement as to homeworkers is today feasible, his authority to prohibit such work is withdrawn. Accommodation of the employment opportunity and earning power of homeworkers was clearly a permissible and appropriate consideration, for it was the action of the Secretary, and not the action of competitive free market forces,

which had in 1942 operated to foreclose employment opportunity from homeworkers.

By contrast, the Court of Appeals would have the Secretary weigh the harm created by this regulatory barrier to homework, now no longer justified by minimum wage enforcement considerations, against a highly speculative harm to ILGWU caused not by agency action, but by competitive economic forces. To the extent that the earning capacity of factory workers may, by the simple competitive impact of forces operating in a free market economy, be reduced, their injury is of no consequence to the responsibilities of the Secretary under the FLSA.

The basic economic theory behind the FLSA also argues against the interpretation of the lower court. An

increase in wages will operate to reduce employment opportunity, a concern manifested by Congress in the legislative history of the FLSA. Thus, the Secretary is required not only to assure a floor for wages, but also to prevent that wage floor from being so high as to substantially limit employment opportunity. §202(b). It is the governmental limitation of employment opportunity with which Congress expressed a concern. It was not the intent of the FLSA to attempt to maximize employment opportunity, or in any way to alter, beyond the minimum wage, the employment level created by the free market. Nowhere is the Secretary delegated the responsibility, or the authority, to decide the maximum number of workers to be employed in any particular industry,

any more than he may decide the maximum wage to be paid in an industry.

The Court would interpret the Act to require the Secretary to prohibit homework for the purpose of maximizing employment opportunity in the knitted outerwear industry. Such a reading of the Secretary's authority would in fact permit, if not require, the Labor Department to exercise far greater governmental control over this nation's economy than Congress certainly intended.

The freedom, within certain necessary and defined limitations, to pursue a chosen vocation without undue governmental restrictions, has long been a fundamental element of our national ideology. The FLSA clearly evidences Congressional respect for this principal, and as a result, imposes explicit

limitations upon the authority of the Secretary to enforce what was in 1938 a far-reaching measure of governmental intrusion into private employment relationships. The Court of Appeals not only reads such limitations entirely out of the Act, but also reads in an even more instrusive suggestion: that the Secretary is empowered, and indeed mandated, to regulate the national labor market so as to maximize employment opportunities. Such an interpretation is without authority under the plain terms of the Act itself, and is clearly contradictory of the regulatory scheme Congress meant to establish.

CONCLUSION

For the reasons stated hereinabove, Petitioners submit that this Court should

grant certiorari to review the decision below.

Respectfully submitted,

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DATE: May 1, 1984

EXHIBIT A

Respondents, appellants below, are the following listed parties:

International Ladies' Garment Workers' Union

Donald Vial, as Director of Industrial Relations for the State of California

Patrick W. Henning, as Labor Commissioner and Chief of the Division of Labor Standards Enforcement of the State of California

Lillian Roberts, as Industrial Commissioner of the State of New York

Amalgamated Clothing and Textile Workers' Union, AFL-CIO

Dalton Industries, Inc.
no parent corporation

subsidiaries, or affiliates:
Columbus Shirt Company
Dalton Sales Corporation
Dalton Imports, Inc.

Knitgoods Workers' Union, Local 155, I.L.G.W.U.

Knitgoods Workers' Union, Local 190, I.L.G.W.U.

Knitted Outerwear Manufacturers' Association, Pennsylvania District

Meyer Manufacturing, Inc.
no parent corporation, subsidiaries, or affiliates

United Knitwear Manufacturers League, Inc.
no parent corporation, subsidiaries, or affiliates

EXHIBIT B

Statutes Involved

Administrative Procedure Act

5 U.S.C. §553(c):

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose....

5 U.S.C. §702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof....

5 U.S.C. §706(2)(A):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

applicability of the terms of an agency action. The reviewing court shall...(2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....

Fair Labor Standards Act

29 U.S.C. §202:

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is hereby declared to be the policy of this Act [29 USCS §§201-216, 217-219, 557], through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referenced to in such industries without substantially curtailing employment or earning power.

29 U.S.C. §211(d):

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act [29 USCS §§201-216, 217-219, 557], and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

(2)

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NO. _____

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MAY 1 1984
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

LUELLA BREEN, ET AL.,

Petitioners,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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177 pp

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2133

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al.,
APPELLANTS

v.

RAYMOND J. DONOVAN, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 81-2606)

Argued September 12, 1983

Decided November 29, 1983

Stephen J. Pollak with whom *S. Elizabeth Gibson*, *Andrew H. Marks* and *Max Zimny*, were on the brief, for appellants.

Marilyn S. G. Urwitz, Attorney, Department of Justice, with whom *J. Paul McGrath*, Assistant Attorney General, *Robert S. Greenspan*, Attorney, Department of

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Justice, and *Ruth Peters*, Attorney, Department of Labor, were on the brief for appellees, Donovan, et al.

Joseph D. Alviani and *Robert R. Ruddock*, were on the brief, for appellees, Breen, et al.

Patricia A. Embrey was on the brief, for appellee, Stowe Woolens, Ltd.

Before: WRIGHT and EDWARDS, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This action arises out of the decision of the Secretary of Labor (hereinafter "the Secretary") to rescind longstanding restrictions on the employment of workers in their homes (homeworkers) in the knitted outerwear industry. 46 Fed. Reg. 50,349 (1981). The knitted outerwear industry consists of those firms that knit from yarn and, in the same establishment, further manufacture, dye or finish knitted garments, garment sections, or accessories for use as external apparel, and those firms that manufacture bathing suits from any purchased fabric. 29 C.F.R. § 530.1(f) (1981) (rescinded by 46 Fed. Reg. 50,349 (1981)). This industry employs approximately 63,000 production workers. 46 Fed. Reg. 50,349 (1981).

The appellants—knitted outerwear manufacturers and manufacturers' associations, labor organizations representing factory workers in the industry, and state labor law enforcement officials—brought suit, principally arguing that the rescission was arbitrary and capricious within the meaning of § 10(e) of the Administrative Procedure Act (hereinafter the "APA"), 5 U.S.C. § 706 (2)(A) (1982). Their concern is that when homeworkers are employed it is not possible effectively to enforce the minimum wage, overtime compensation and child labor provisions of the Fair Labor Standards Act of 1938 (hereinafter "the Act"), 29 U.S.C. §§ 201-219 (1976 &

Supp. V 1981). They also claim that payment of subminimum wages to homeworkers in the industry will cause competitive injury to employers complying with the Act and will drive down the wages of all employees in the industry. The District Court denied the appellants' motion for summary judgment and granted summary judgment for the appellees.

Because we find that the Secretary's decision was arbitrary and capricious, we reverse the decision of the District Court and vacate the action of the Secretary rescinding restrictions on the employment of homeworkers. We will remand the case to the District Court with instructions to return the matter to the Secretary for further proceedings, as may be appropriate, consistent with the opinion of this court.

I. BACKGROUND

A. *The History of Restrictions on Industrial Homework*

To appreciate the significance of the Secretary's decision, one must first understand the historical context in which it arose. The concerns about industrial homework raised by the appellants echo those voiced by critics of substandard labor conditions throughout this century. *See* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, IN THE MATTER OF THE RECOMMENDATION OF INDUSTRY COMMITTEE NO. 32 FOR A MINIMUM WAGE RATE IN THE KNITTED OUTERWEAR INDUSTRY AND INDUSTRIAL HOME WORK IN THE KNITTED OUTERWEAR INDUSTRY, FINDINGS AND OPINION OF THE ADMINISTRATOR 13 (1942) (hereinafter "1942 FINDINGS"), *reprinted in* I Joint Appendix ("J.A.") 79 ("The problems inherent in [homework] have been recognized for a long period of time."). The history of legislative attempts to remedy such concerns evinces an evolving recognition of the need for restriction, rather than mere regulation, of industrial homework in industries in which it is pervasive.

Regulation of homework was initially undertaken by the states around the turn of the century. Between 1871 and 1904, twelve states enacted statutes either barring conversion of homes into industrial workshops or requiring inspection and registration of homework. Comments of International Ladies' Garment Workers' Union 10 (July 1, 1981) (hereinafter "ILGWU Comments"), *reprinted in* II J.A. 308. In the early 1900's, commissions in at least two of these states reported that regulatory efforts had been failures. *Id.* at 13, II J.A. 311 (quoting reports from Pennsylvania and Massachusetts). A commission in New York found that

> [h]ome work means unregulated manufacturing carried on beyond the possibility of control as to hours of women's work, child labor, night work of minors or cleanliness and sanitation of work places. From the point of view of the community the greatest objection to home work is its essential lawlessness.

Quoted in 1942 FINDINGS, *supra*, at 13, *reprinted in* I J.A. 79 (footnote omitted).

By the mid-1930's, there was increasing support for the prohibition of homework.[1] Under the National Indus-

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[1] The comments received during the Department of Labor's notice and comment rulemaking in 1981 included submissions from five former Secretaries of Labor—Peter Brennan, Willard Wirtz, Ray Marshall, Arthur Goldberg and John Dunlop. These Secretaries criticized the proposal to legalize homework and cited a number of reports from the 1930's:

> In the 1930's, a study of the Bureau of Women and Children of the Pennsylvania Department of Labor concluded: "Homework can never be regulated. No matter how stringent the regulations, how great the enforcement, how honest the investigators, the sweatshop conditions will continue to exist unless homework is abolished."
>
> . . . .
>
> In a study of homework in Rhode Island, the Women's Bureau said flatly: "Effective regulation of homework

trial Recovery Act, codes of fair competition were drawn up for 556 industries, and provisions for regulation or prohibition of homework were included in 118. Approximately one hundred of the codes "provided for the complete abolition of homework." BRANCH OF RESEARCH & STATISTICS, WAGE & HOUR & PUBLIC CONTRACTS DIV., DEP'T OF LABOR, EMPLOYMENT OF HOMEWORKERS UNDER THE FAIR LABOR STANDARDS ACT 15 (1959) (hereinafter "1959 REPORT"), *reprinted in* II J.A. 489. The National Industrial Recovery Act subsequently was found unconstitutional by the Supreme Court in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). However, one year later the United States' Children's Bureau reported on the relative effectiveness of *prohibition* and *regulation* under the codes prior to *Schechter*:

> Great gains were made where the codes prohibited the giving out of home work. But in the industries in which home work was still permitted, even though limited by certain regulations, the ancient evils continued to exist and to constitute a menace to the higher labor standards that had been achieved for factory workers.

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is impossible." In particular, it pointed out, "the prevention of child labor is practically impossible."

A special committee appointed by President Roosevelt to review the administration of the National Industrial Recovery Act concluded that "homeworkers did not come to enjoy code wage standards, even in industries where the regulations were severe and enforcement was exacting . . . The provisions failed most conspicuously in regulating hours of employment and child labor. It was found that only complete prohibition could eradicate the evils of industrial homework."

Comments of Peter Brennan (May 21, 1981), *reprinted in* I J.A. 172-73; Comments of Willard Wirtz, Ray Marshall and Arthur Goldberg (May 25, 1981), *reprinted in* I J.A. 174-75; Comments of John T. Dunlop (June 1, 1981), *reprinted in* I J.A. 176-77 (hereinafter collectively referred to as "Secretaries' Comments").

U.S. CHILDREN'S BUREAU, INDUSTRIAL HOMEWORK UNDER THE NATIONAL RECOVERY ADMINISTRATION 21 (1936), *quoted in* ILGWU Comments, *supra*, at 14, *reprinted in* II J.A. 312 (footnote omitted).

In 1938, Congress passed the Fair Labor Standards Act of 1938,[2] the "central aim" of which "was to achieve, in those industries within its scope, certain minimum labor standards." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). *See also Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943).[3] The Act established minimum hourly wages for employees,[4] limited the number of hours employees could work without receiving overtime compensation,[5] and prohibited oppressive child labor.[6] Section 11(c) of the Act required employers to keep and make available records of employees' wages and hours.[7] Shortly after passage of the Act, the Administrator (hereinafter "the Administrator") of the Wage and Hour Division (hereinafter "the Division") issued a

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[2] Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981)).

[3] It is clear, however, that the Act was also concerned with the employment consequences of achieving this objective. *See id.* § 2(b), 62 Stat. at 1060 (codified as amended at 29 U.S.C. § 202(b) (1976)) ("It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.").

[4] *Id.* § 6, 62 Stat. at 1062-63 (codified as amended at 29 U.S.C. § 206 (1976 & Supp. V 1981)).

[5] *Id.* § 7, 62 Stat. at 1063-64 (codified as amended at 29 U.S.C. § 207 (1976 & Supp. V 1981)).

[6] *Id.* § 12, 62 Stat. at 1067 (codified as amended at 29 U.S.C. § 212 (1976)).

[7] *Id.* § 11(c), 62 Stat. at 1066-67 (codified at 29 U.S.C. § 211(c) (1976)).

statement interpreting the Act to cover workers whether they worked at home or in the factory. *See* 1959 REPORT, *supra*, at 18, *reprinted in* II J.A. 492. All employers of homeworkers were required to keep special records indicating the identity of homeworkers and the time worked and piece rates paid with respect to each lot of work issued. *See* 1942 FINDINGS, *supra*, at 19-20, *reprinted in* I J.A. 85-86. Employers were also required to obtain handbooks from the Division and distribute them to homeworkers they employed so that the homeworkers would have records of times worked and rates paid. These handbooks would be retained by the homeworker except during the time necessary for the employer to complete a periodic entry required by the regulations. *Id.* at 20, I J.A. 86.

Soon after the promulgation of these regulations, pressures to prohibit homework intensified. A number of states had taken such action,[8] and a 1940 national conference on labor legislation composed of government representatives from almost every state recommended that the Division seriously consider prohibition of industrial homework. *Id.* at 13, I J.A. 79. Between 1941 and 1943, the Division held hearings "for seven industries in which homework was most prevalent and in which violations of the Fair Labor Standards Act had been a problem" (1959 REPORT, *supra*, at 19, *reprinted in* II J.A. 493): the jewelry, knitted outerwear, gloves and mittens, button and buckle, embroidery, handkerchief and women's apparel industries.

One outgrowth of these hearings, and the related investigations of the Division, was a series of reports issued

[8] In 1935, New York passed a law prohibiting homework in certain specified industries. 1959 REPORT, *supra*, at 16, *reprinted in* II J.A. 490. By 1942, nine states had passed laws authorizing "prohibition of home work directly or by industry orders. Five states [had] prohibited home work on knitted outerwear entirely or in the manufacture of specific products." 1942 FINDINGS, *supra*, at 13, *reprinted in* I J.A. 79.

by the Division. Because the reports represent the most comprehensive analysis by the Department of Labor (hereinafter "the Department") of homework and methods of regulating it, we deem it appropriate to summarize at length the conclusions of the report dealing with the knitted outerwear industry.[9] The Administrator reported that officials charged with enforcing the Act "are of the opinion that there is almost universal violation of the record-keeping requirements of the Wage and Hour Division with respect to home workers." 1942 FINDINGS, *supra*, at 22, *reprinted in* I J.A. 88. Actual inspection of fifty-six employers revealed that forty-five "were in violation of the record-keeping provisions in one manner or another." *Id.* at 20, I J.A. 86. This study also found that only twelve of the fifty-two employers for whom information was available were violating neither the wage nor the hour provisions of the Act with respect to homeworkers. *Id.* at 22, I J.A. 88. Moreover, the employers violating either the wage or the hour provisions of the Act employed ninety-five percent of the total homeworkers in the study,[10] and employers violating both provisions accounted for more than two-thirds of the total. *Id.* To determine the extent of violations within each firm, the Division interviewed 430 homeworkers. This study revealed that approximately seventy percent of these workers earned less than the minimum wage of thirty-five cents per hour and twenty-three percent earned less than twenty cents per hour. The average wage for home-

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[9] The 1942 findings included by the parties in the Joint Appendix deals specifically with the knitted outerwear industry. Findings were issued by the Administrator for all seven industries at issue, and both parties to this appeal indicate that these findings contain similar data. Appellees' brief, p. 9 n.7; Appellants' brief, p. 8 n.5.

[10] The study involved 1,577 homeworkers, a significant percentage of the estimated 6,000 to 8,000 homeworkers employed in the industry at the time. 1942 FINDINGS, *supra*, at 14, 22, *reprinted in* I J.A. 80, 88.

workers in the sample group was twenty-seven cents per hour, less than eighty percent of the minimum wage. *Id.* at 23, I J.A. 89.

The Administrator then examined the underlying reasons for the violation rate and concluded that "[t]here are many opportunities for evasion of the minimum wage standards which are inherent in the home work practice." *Id.* at 26, I J.A. 92. One of the impediments to enforcement of minimum wages was the difficulty of ascertaining the identity of homeworkers:

> If the employer chooses to omit names of homework employees from his pay roll, there is almost no effective means of check-up since the workers may be scattered through the city or the State. Even where the list of names is properly kept, there is no means of ascertaining how many persons in the family may have been actually engaged in the work. The constant change in address of low-income families and the high turnover in home work employees complicate the problem of finding the home worker.

Id.

Even when workers could be identified, it was difficult to obtain accurate records of the number of hours each employee had worked, necessarily burdening efforts to ensure compliance with minimum wage, maximum hour, and overtime provisions of the Act. The Administrator found that:

> It is obvious, however, that the employer can have no certain knowledge of the number of hours spent by the home worker. Even with the best of intentions the home worker has many interruptions and is frequently unable to keep an accurate record of hours worked. Fear that work will be withdrawn if the home worker is unable to make the minimum is a strong incentive to falsify records.

Id.

Testimony by Division officials also indicated that the foregoing problems made investigation of wage and hour violations vastly more difficult when homeworkers were involved.[11] The Division's Regional Director for Connecticut, New Jersey and New York testified that "an investigation in a home work industry takes anywhere from two weeks to two months, that is, to be able to get time studies and the information necessary to insure a complete inspection, whereas, the average inspector can complete one or two cases a week of factory inspection." *Id.* at 27, I J.A. 93 (quoting testimony of Arthur J. White).

When violations were discovered, compensating homeworkers was onerous. Complex employer-employee relationships (often involving middlemen) made it "difficult to determine where to place the responsibility for violations" in the industry: "[c]ontractors usually have more than one jobber, necessitating several individual negotiations and frequently manufacturers disclaim liability for

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[11] The problem involved when inspecting factory conditions contrasted to those problems which confront us when inspecting home work conditions are distinctly different in approach, time consumption and results obtained. The inspector in one or two visits to a factory is able to interview a sufficient number of employees and is also able to check records pertinent to their employment. He can, therefore, substantially determine the scope and seriousness of violations uncovered or compliance on the part of the employer. As against this comparatively simple procedure, home work investigations involve visits to homes of home workers, scattered as they are throughout every part of the City of New York and every part of the region. Frequently our inspectors must make more than one visit for the purpose of interviewing them. Each home worker interviewed constitutes almost as much inspection work as does an entire inspection of a fair sized factory establishment.

1942 FINDINGS, *supra*, at 27, *reprinted in* I J.A. 93 (quoting testimony of Arthur J. White) (footnote omitted).

contractors' violations." *Id.* at 29, I J.A. 95. Additionally, the responsible parties were often bankrupt by the time the Division obtained judgment against them. *Id.*

These considerations led the Administrator to conclude that:

> The extensive evidence in the record can leave no doubt of the high incidence of subminimum employment of home workers in the Knitted Outerwear Industry. The record shows that industrial homework furnishes a ready means of circumventing or evading the minimum wage order for this industry, that the existing requirements of the Act have been evaded by these means and that the continuation of home work will endanger the standards of factory employment.

Id. at 30-31, I J.A. 96-97.

The Administrator then considered whether violations could be controlled if the Division undertook time studies and fixed piece rates for homework, and concluded that this was not an effective enforcement option. First, because of wide variations in the productivity of individual workers, establishing an average piece rate resulted in "only the roughest kind of approximation of actual individual hours worked." *Id.* at 32, I J.A. 98. This problem was exacerbated by variations in "size of yarn, or closeness or looseness of stitch," *id.* at 33, I J.A. 99 (quoting testimony of Anna L. Hoffer), as well as different combinations of styles, sizes and color. *Id.* at 32, I J.A. 98.[12] Even if a piece rate could be identified, the Admin-

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[12] The extent of this problem was witnessed under the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (codified at 15 U.S.C. §§ 701-712 (1934)), *held unconstitutional in Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). "The N.R.A. code for the industry lasted one year and 5 months but during this entire period efforts to establish minimum piece rates for home work were unsuccessful." 1942 FINDINGS, *supra*, at 18, *reprinted in* I J.A. 84.

istrator found that there was no effective way to use the rate to protect the wage rights of *individual* homeworkers.[13] The record also indicated that employers would still have "many ways of reducing the earnings of the home worker, even if you do pay her the prescribed piece work rate." *Id.* at 32, I J.A. 98 (quoting testimony of Julius Traugot). Hence, the Administrator concluded that "effective enforcement of the minimum wage order for the Knitted Outerwear Industry cannot be expected with respect to industrial home workers by the piece-rate method and that prohibition is required." *Id.* at 34, I J.A. 100.

The Administrator soon acted on the information contained in the Division reports and prohibited homework in the seven industries studied, unless homeworkers came within certain narrow exceptions. The regulation applicable to the knitted outerwear industry authorized the issuance of special homework certificates to workers who were unable to adjust to factory work because of physical or mental disability, or were unable to leave home because their presence was required to care for an invalid in the home.

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[13] The Act does not authorize the payment of a piece rate which is "commensurate" with applicable minimum hourly rates. Consequently, no average rate or piece rate adjusted with a percentage allowance can be considered a proper rate of compensation unless make-up is paid to the worker who does not earn the hourly minimum. Such make-up pay can be calculated only on the basis of records of hours worked and, as has been seen, such information cannot be obtained. It would, therefore, be necessary either to adopt the alternative of setting the piece rate at the level of the home worker of the least productivity which is not feasible from the business standpoint, or to adopt the equally unfeasible alternative from an administrative standpoint of setting individual piece rates for each home worker in each of the numerous operations to which he may be assigned.

Id. at 32, I J.A. 98 (footnote omitted).

The authority of the Administrator to take such action was upheld in *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945),[14] and this authority was explicitly conferred by act of Congress in 1949. In amending the Act, Congress provided that:

> The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, § 9, 63 Stat. 910, 916-17 (1949) (codified at 29 U.S.C. § 211(d) (1976)). With the Division's authority

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[14] In reviewing a petitioner's challenge to restrictions in the embroidery industry, the Court said:

> [I]f the prohibition [*i.e.*, restrictions] cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage. This is true not merely as a matter of inference from evidence having only prospective and predictive value. It is proved conclusively by the Administrator's experience in attempting by regulatory methods to secure compliance with the previously prevailing lower "committee" rate. His experience is borne out by that of state and federal authorities prior to the Fair Labor Standards Act. Attempts to maintain minimum wages by regulating homework have failed generally of their purpose. This failure, after fair trial, is responsible for the Administrator's resort to prohibition in the present order.

324 U.S. at 252-54 (footnotes omitted). The Court found that in light of the Administrator's findings, restriction was within his statutory authority both "by necessity to avoid self-nullification and by its explicit terms." 324 U.S. at 255.

to restrict homework thus firmly established, the Division adhered to this method of controlling homework abuses until the Secretary's decision in 1981.[15]

B. *The Secretary's Action*

On December 5, 1980, the Division published a notice of hearings to obtain information on the situation with respect to industrial homework and the extent to which it might bear "on the Secretary's statutory responsibility 'to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed' in the Fair Labor Standards Act." 45 Fed. Reg. 80,555 (1980). Hearings were subsequently held in Burlington, Vermont and Washington, D.C. At the hearings, opposition to the restrictions on homework came almost entirely from homeknitters (and their representatives) from Vermont, and government officials from Vermont.

On May 5, 1981, the Division published a notice proposing removal of the restrictions on homework in the seven industries. 46 Fed. Reg. 25,108 (1981). The Department indicated that its "primary concern is the protection of workers from the illegal payment of subminimum wages," and requested additional information on the effects of its proposal on the Act's minimum wage provisions, the seven currently restricted industries and small businesses. *Id.* at 25,109.

Following receipt and consideration of more than 10,000 comments, the Secretary "decided to remove the restrictions on the employment of homeworkers in the knitted outerwear industry and to retain such restrictions in the remaining six industries." 46 Fed. Reg. 50,348 (1981). This decision was based primarily on the finding that "substantial curtailment of employment opportunities and

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[15] In 1959, prohibitions were removed from the manufacture of hand fashioned jewelry on certain Indian reservations. 29 C.F.R. § 530.12(b) (1960).

earning power will result from a continuation of the restrictions on industrial homework in the knitted outerwear industry. No such demonstration was made with regard to industrial homework in the other six industries [and consequently] it appears reasonable to remove the restrictions in the knitted outerwear industry only." *Id.* at 50,349.

The Secretary indicated that in conjunction with the removal of the restrictions the Department would undertake "a concerted compliance effort in this industry." The Secretary suggested that such an effort could be effective:

> Since it appears that homeworkers will comprise only a small percentage of the approximately 63,000 production employees in this industry, an effective enforcement program is feasible. When the restrictions were established in knitted outerwear, almost 40 years ago, effective oversight of homework in this industry was not possible as it was estimated that homeworkers constituted more than 20 percent of the workforce, the enforcement program of the Department was newly established, and acceptance of the principle of a minimum wage among covered employers was much less prevalent than at present.

Id.

On October 27, 1981, the appellants brought an action, pursuant to section 10(b) of the APA, 5 U.S.C. § 703 (1982), to enjoin the Secretary's rescission of the restrictions on homework in the knitted outerwear industry. The appellants alleged that the Secretary's decision to rescind exceeded his statutory authority under section 11 (d) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 211(d) (1976), was arbitrary and capricious within the meaning of section 10(e) of the APA, 5 U.S.C. § 706(2) (A) (1982), and was not accompanied by an adequate statement of basis and purpose as required by section 4(b) of the APA. 5 U.S.C. § 553(c) (1982).

While the District Court held that the appellants did have standing to sue, it rejected their challenges to the rescission. The court found that the appellants' argument concerning the alleged limitations of the Secretary's statutory authority was not supported by the language or history of section 11(d), *International Ladies' Garment Workers' Union v. Donovan*, Civ. No. 81-2606, mem. op. at 6 (D.D.C. July 23, 1982), *reprinted in* II J.A. 608, and the appellants do not raise this argument on appeal. The court then indicated that in deciding whether the rescission was arbitrary and capricious, the court should review the rescission with "extreme deference." The court reasoned that because the determination of how the minimum wage law can best be enforced is "within the special competence of the Executive Branch," this determination should be set aside "only if there is virtually no evidence to support it." *Id.* at 9, II J.A. 611. Finding that the Secretary had satisfied this minimal standard, the District Court upheld his decision.

II. Standing and Cause of Action

The appellants have brought this action primarily to redress injuries resulting from payment of subminimum wages by homeworker employers. They allege that this unfair competition will injure factory employers by causing them to lose markets and profits. Factory employees, in turn, will be injured because their employers will be forced to reduce wages and lay off workers.

The appellees argue that as a threshold matter the appellants have neither a cause of action nor standing to sue. Both arguments are largely based on the same premise: sections 16 and 17 of the Act, 29 U.S.C. §§ 216, 217 (1976 & Supp. V 1981), lay "out a distinct and detailed statutory mechanism for judicial enforcement of [the Act] specifically by employees who are themselves denied the minimum wage, or by the Secretary on behalf

of such employees." Appellees' brief, p. 34.[16] The appellees argue that this statutory mechanism was intended to be exclusive, and hence forecloses judicial review of agency action under the APA. In the appellees' view, it also means that the appellants are not "within the zone of interests" protected by the Fair Labor Standards Act and consequently do not have standing to sue under the APA.

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[16] The pertinent language of § 16 provides:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of seciton 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. . . .
>
> (c) . . . The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.

29 U.S.C. § 216(b), (c) (Supp. V 1981). The pertinent language of § 17 provides:

> The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees . . . .

29 U.S.C. § 217 (1976).

Initially, we must consider the appellants' contentions that the appellees are foreclosed from raising the cause of action argument by their failure to raise it below, and from raising both the cause of action and standing arguments by their failure to file a cross appeal. *See Wisconsin Bankers Association v. Robertson*, 294 F.2d 714 (D.C. Cir.), *cert. denied*, 368 U.S. 938 (1961). Because "the question of standing goes to this court's jurisdiction, we must decide the issue" in spite of the waiver arguments raised by the appellants. *Southern Mutual Health Association v. Califano*, 574 F.2d 518, 522 (D.C. Cir. 1977). *See generally Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (because subject-matter jurisdiction is an Article III requirement, a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings; additionally, "a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion").

The issue of whether a complaint has properly stated a Federal cause of action is generally viewed as going to the merits, but it may be dismissed on jurisdictional grounds where the Federal action "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). While we think it clear that the appellants' assertion of a cause of action is neither wholly insubstantial nor frivolous and consequently we could reject the appellees' cause of action argument because of their failure to raise it below, *cf. Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 279 (1977) (where plaintiff's allegation that his rights were violated and he was entitled to relief was "not so patently without merit as to fail the test of *Bell v. Hood* . . . the question as to whether the respondent stated a claim for relief under § 1331 is not of the jurisdictional sort which the

Court raises on its own motion"), we will address the appellees' argument to resolve any jurisdictional uncertainties. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 380 (1978) (White, J., concurring) ("if we are not obliged to [consider whether a private cause of action exists], it is at least advisable to address this threshold jurisdictional issue"). *Cf. Morris v. Washington Metropolitan Area Transit Authority*, 702 F.2d 1037, 1040-42 (D.C. Cir. 1983) (raising *sua sponte* doubts about existence of direct remedy under Constitution and, while remanding on other grounds, directing the district court to permit parties to amend pleadings to address this issue).

The appellants argue that they have stated a valid cause of action and are entitled to judicial review under section 10(a) of the APA, 5 U.S.C. § 702 (1982), which provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Despite the apparent force of the appellants' position, the appellees contend that this right to review of the Secretary's action is foreclosed in this case by section 10 of the APA, which prevents courts from reviewing actions under the APA where "statutes preclude judicial review." 5 U.S.C. § 701(a)(1)(1982).

We find the appellees' contentions to be wholly unpersuasive. The burden on the appellees in advancing an argument against judicial review is a heavy one, and we conclude that they have completely failed to satisfy that burden. "The legislative material elucidating that seminal act [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41

(1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)) (footnote omitted). We have indicated that under the APA there is "a strong presumption of reviewability that can be rebutted only by a clear showing that judicial review would be inappropriate." *NRDC, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979). *Accord Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (absent express statutory prohibition of review, the Secretary bears a "heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision"); *Abbott Laboratories*, 387 U.S. at 140 ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962) (requiring "clear or convincing" evidence of congressional intent to make "broadly remedial provisions" of the APA unavailable to review acts under the Immigration and Nationality Act).

The appellees do not suggest that any statute explicitly precludes review of the Secretary's decision, but argue that preclusion should be *implied* from the Act's provision for actions by underpaid employees, or the Secretary, to recover unpaid wages. The suggestion that provision of such an action evidences a clear and convincing intent to exclude all other judicial relief, and in particular the right of aggrieved parties to challenge allegedly arbitrary and capricious actions by the Secretary, borders on the incredible. As we recently indicated, in rejecting a very similar argument, "[a] private right of action . . . is addressed to suits by private litigants *against private parties* allegedly acting in violation of a statutory command. The instant action, seeking judicial redress of alleged *administrative* misconduct, is a distinct form of proceeding . . . ." *Common Cause v. Department of Energy*, 702 F.2d 245, 249 n.30 (D.C. Cir. 1983) citations omitted). *See also Abbott Laboratories*, 387 U.S. at 141 (quoting L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 357 (1965)) (" 'The mere fact

that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right of review is too important to be excluded on such slender and indeterminate evidence of legislative intent.' ").

Moreover, rather than providing proof of an intent to restrict review, an analysis of the language and history of the Act compels allowance of the review sought in this case. The language and history unmistakably evidence an intent to protect all covered employees and employers from the economic consequences of subminimum wages paid to a small sector of the labor force. Section 2(a) of the Act, indicates that

> [t]he Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; . . . [and] (3) constitutes an unfair method of competition in commerce.

29 U.S.C. § 202(a) (1976). Similarly, the House Report argued that following passage of the Act

> [n]o employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes.

H.R. REP. No. 2182, 75th Cong., 3d Sess. 6-7 (1938). *See also Lerwill v. Inflight Services, Inc.*, 379 F. Supp. 690, 696 (N.D. Cal. 1974) ("The Act serves a public and a private purpose. Its enforcement provisions are intended to protect workers and their families, whom the

Act is intended to benefit, *see* 29 U.S.C. § 202 (1976), but it is also intended to protect the employers who comply with its terms."), *aff'd sub nom. Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978).

This concern was reiterated by Congress in the Fair Labor Standards Amendments of 1961.[17] Congress amended sections 16(b) and 17 of the Act to permit the Secretary to commence actions seeking payment of back wages due to employees because of minimum wage and overtime violations, even absent a request for such action by employees. Section 12, 75 Stat. 65, 74-75 (1961) (codified as amended at 29 U.S.C. §§ 216(b), 217 (1976 & Supp. V 1981)). *See* H.R. REP. No. 75, 87th Cong., 1st Sess. 28 (1961). The House Report explained the need for this change:

> Under the present provisions of the act, the Secretary of Labor has no authority to require the payment of minimum wages and overtime compensation not paid in compliance with the law, except where an employee requests that an action be brought by the Secretary of Labor. This limitation has impeded the Secretary in his efforts to enforce the act since many employees who have not been paid in compliance with the act are hesitant about requesting legal action against their employers.

Id. at 27-28. The Report argues that the amendments "would increase the level of compliance with the statute, and *would protect complying employers* from the unfair wage competition of the noncomplying employers."[18]

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[17] Pub. L. No. 87-30, 75 Stat. 65 (1961) (codified as amended in scattered sections of 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981)).

[18] *Id.* at 28 (emphasis added). *See Hodgson v. YB Quezada*, 498 F.2d 5, 6 (9th Cir. 1974) ("[T]he restraint embodied in Section 17 serves at least two important purposes: it serves to increase the effectiveness of the Act by depriving a violator of any gains resulting from his violation, and it protects those employers who comply with the Act from unfair competition by those who do not comply."); *Wirtz v. Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968) (same).

The legislative history also suggests that the protection sought for all covered employers and employees will be jeopardized unless those parties are entitled to judicial review of the Secretary's actions. First, there may be occasions when the interests of underpaid employees are such that they cannot be expected to bring actions which will, in effect, protect employers complying with the Act and their employees.[19] The 1961 amendments make it clear that protection of the latter parties' interests does not depend on private actions by underpaid employees; the Secretary may bring actions to enforce the Act even absent the consent of the underpaid em-

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[19] In some circumstances, this will be because the underpaid workers are not in a position to sue for back wages, even though they might like to do so. *See* H.R. REP. No. 75, 87th Cong., 1st Sess. 28 (1961) (employees may be hesitant about requesting legal action against their employers). In other circumstances, the interests of underpaid employees and complying employers (and their employees) may be in conflict. Such would be the case if the underpaid employees feared retaliation (or serious economic consequences for their employer, which might ultimately have adverse consequences for the employees) resulting from any action (including one brought by the Secretary) against their employer, and yet the 1961 amendments do authorize such an action. The appellees argue that the instant case also involves conflicting interests, because restrictions on homework will "bar the home-knitters' very livelihood." Appellees' brief, p. 38 n.20. Nevertheless, there is no question that the Secretary does have the authority to impose such restrictions. *See* 29 U.S.C. § 211(d) (1976). Hence, it is evident that the Act does authorize the Secretary to take action that may be contrary to the perceived interests of some underpaid employees. Indeed, in at least some respects, minimum wage laws are inherently contrary to the interests of those underpaid employees who may not be employable at all at the minimum wage.

We do not mean to suggest that Congress was not primarily concerned with the well-being of underpaid employees. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945). Our point is that this was not the sole congressional concern, and that it is clear from the Act that there may be times when the Secretary should take certain actions to enforce the Act despite the protestations of some underpaid employees.

ployees. Second, the Act reflects a recognition of the limitations of actions for back wages as a means of assuring compliance with the Act. This is evidenced by section 11(d), which authorizes the Secretary to regulate, and if necessary prohibit, homework. 29 U.S.C. § 211(d) (1976). Hence, it is apparent that effective protection of the interests of complying employers and their employees significantly depends on reasonable actions by the Secretary. We therefore conclude that permitting the appellants to seek judicial review to insure that such actions are not arbitrary and capricious is entirely consistent with the language, history and purposes of the Act.[20]

The foregoing discussion permits us to dispose quickly of the challenges to the appellants' standing to sue. The crux of the appellees' position is that the appellants do not fall within the "zone of interests" protected by the Act. *See generally Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153-54 (1970). We have indicated that in applying the zone of interests test we "must discern whether the interest asserted by a party in the particular instance is one intended by Congress to be protected or regulated by the statute under which suit is brought." *Control Data Corp. v. Baldrige*, 655 F.2d 283, 293-94 (D.C. Cir.) (footnote omitted),

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[20] It is also clear that this protection cannot be provided by simply permitting underpaid employees to seek review of the Secretary's actions. *See* note 19 *supra*. Furthermore, it is very questionable whether the appellees' position would even permit underpaid employees—in this case homeworkers—to challenge the Secretary's actions, since the Act has already provided a "distinct and detailed statutory mechanism" for enforcement of their rights. Appellees' brief, p. 34. Moreover, homeworkers who are not working because of restrictions might be in a particularly weak position to assert a right to review because they can hardly be considered to be members of the class of underpaid employees. The hardship such parties might have to endure further illustrates the folly of the appellees' attempt to insulate the Secretary's action from the safeguards provided by the APA.

cert. denied, 454 U.S. 881 (1981).[21] Additionally, " 'slight' beneficial indicia will be sufficient to sustain a party's assertion of standing." *Id.* at 295. The earlier discussion in this section reveals that there are clear indicia that compliant employers and their employees are within the zone of interests protected by the Fair Labor Standards Act. Consequently such parties are persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702 (1982), and (assuming they meet the other tests for standing) have standing to sue under the APA. *Sierra Club v. Morton*, 405 U.S. 727, 732-33 (1972); *Barlow v. Collins*, 397 U.S. 159, 164-65 (1970); *Association of Data Processing Service Organizations*, 397 U.S. at 153-57 (1970). Hence, we reject the suggestion that the manufacturers, manufacturers' associations and labor organizations[22] do not satisfy the zone of interests test in this case.[23]

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[21] For a recent discussion of this test, see *American Friends Service Comm. v. Webster*, No. 81-1735, slip op. at 35-52 (D.C. Cir. Sept. 30, 1983).

[22] The appellees do not, and could not reasonably, claim that the fact that manufacturers' associations and labor organizations are suing in a representative capacity presents additional complications in this case. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) ("Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

[23] The appellees have also suggested that where the plaintiffs' interests diverge from the interests of those whom a statute is designed to protect, the plaintiffs have no standing to sue. The appellees read our decisions in *Cooper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951 (D.C. Cir. 1982), and *Control Data Corp.*, 655 F.2d 283, too broadly. In both of these cases, we explained that there was

The appellees also suggest in a footnote that the relief sought by the appellants—reimposition of restrictions—will not redress the injuries they claim. Appellees' brief, pp. 38-39 n.21. It is well-established that to have standing a party must allege an injury that "'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976)).[24] The appellees argue that to satisfy this standard, the appellants must show that if restrictions are reimposed, employers of homeknitters will employ factory labor. This position reflects a serious misunderstanding of the nature of the appellants' alleged injuries. The appellants allege that unfair competition (*i.e.*, payment of subminimum wages) from homeworker employers will injure factory employers paying lawful wages and the resulting pressures to lay off workers and reduce wages will injure factory employees. We must accept these allegations as true for purposes of determining standing. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975).

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no evidence indicating an intent in the pertinent statutes to protect or benefit the plaintiffs and that the protection sought by the plaintiffs was inconsistent with the purposes of these statutes. 679 F.2d at 953; 655 F.2d at 295. In contrast, it is clear that the Fair Labor Standards Act was intended to protect compliant employers and their employees as well as underpaid employees. Efforts to insure that any competing interests of these parties are resolved by the Secretary in a rational manner, and that the Act is rationally enforced, are certainly consistent with this statutory intent.

[24] *Accord Bryant v. Yellen*, 447 U.S. 352, 368 (1980) (finding standing where it was "likely" that relief requested by plaintiffs would result in benefit they hoped for); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (plaintiffs' injury must be "likely to be redressed if the requested relief is granted"); *Safir v. Dole*, No. 81-2271, slip op. at 8 (D.C. Cir. Sept. 30, 1983) (same).

The alleged injuries can be redressed by controlling the source of the unfair competition (*i.e.*, restricting employment of homeworkers); in other words, whether homeworker employers thereafter decide to employ factory workers simply has no relevance to the appellants' claims. *Cf. Simon*, 426 U.S. at 45 n.25 ("The complaint in *Data Processing* alleged injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action.").

Alternatively, the appellees' argument can be read to suggest that injurious competition will continue if restrictions are reimposed because homework employers will either hire homeworkers illegally or will move their operation abroad and compete by using lower-priced foreign labor.[25] This claim is substantially different than those on which the Supreme Court relied in the cases cited by the appellees—*Warth* and *Simon*. In *Warth*, the Court found that low and moderate income individuals seeking housing did not have standing to challenge exclusionary zoning practices, in part because redress of their injury "depended on the efforts and willingness of third parties to build low- and moderate-cost housing." 422 U.S. at 505. Similarly, the relief sought by the plaintiffs in *Simon* (denial of favorable tax treatment to hospitals that did not serve indigents) would only encourage third parties to provide the hospital treatment desired by the appellants; whether third parties would provide this treatment was

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[25] Appellees' brief, p. 39 n.20. The appellees make these allegations about the likely actions of homework employers as evidence of their claim that these employers will not hire factory workers. The appellees' failure to argue explicitly that the competition resulting from such actions will approach that resulting from rescission of restrictions, gives cause to wonder whether even the appellees think this is a serious possibility. It is also noteworthy that the Secretary did not suggest this possibility in justifying rescission of the restrictions.

"speculative at best." 426 U.S. at 43 (footnote omitted). In contrast, the relief sought by appellants would make the injurious conduct of third parties complained of in this case illegal; only by taking extraordinary measures—*i.e.*, violating the law or starting new businesses overseas—could third parties prevent redress of the appellants' injuries.[26]

The appellants need not negate every conceivable impediment to effective relief no matter how speculative, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78 (1978), nor are they required "to *prove* that granting the requested relief is *certain* to alleviate" their injury. *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1248 (D.C. Cir. 1983). *See also Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980).[27] The

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[26] *See American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 151 (D.C. Cir. 1977) ("Here, the AJC and other such groups will clearly remain free to pursue their travel businesses, however the tax status is finally resolved. By contrast, in [*Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150 (1970)], if the Comptroller of the Currency's ruling had been overturned on judicial review, the offering of data processing services by national banks would have been *illegal*, and petitioners undoubtedly would have faced no further competition from that source, absent statutory revision."), *cert. denied*, 435 U.S. 947 (1978).

[27] In *Community Nutrition Institute* we also explained that

> litigation often "present[s] complex interrelationships between private and government activity that make difficult absolute proof that the harm will be removed." Thus, a court should be careful not to require too much from a plaintiff attempting to show redressability, lest it abdicate its responsibility of granting relief to those injured by illegal governmental action.

698 F.2d at 1248 (quoting Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 215 (1980-81)). We are also wary of requiring too strong a showing by the appellants in a case such as

speculation offered by the appellees is not supported by sound reasoning or the record.[28] Also, as Congress passed

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this where—as the appellees repeatedly point out—some uncertainties are inevitable.

Furthermore, even if reimposition of restrictions would only significantly—rather than completely—redress the appellants' injuries, this would be sufficient to permit judicial review. Nichol, *supra*, at 222 (*"standing should be granted if a favorable decision would contribute in any significant manner to remedying or preventing the plaintiff's injury."*) (footnote omitted). This is certainly consistent with the desire underlying the redressability requirement "to limit the judicial role to measures that will produce tangible, meaningful results in the real world." *Common Cause*, 702 F.2d at 254.

[28] As we discuss in greater detail *infra*, restrictions on homework in 1942 were followed by a reduction in homeworkers from approximately 30% to 1.6% of all knitted outerwear employees, and the appellees appear to acknowledge some causal relationship between the restrictions and the reduction.

The suggestion that homeworker employers will move abroad is only supported by the testimony of one homeworker employer, arguing against domestic restrictions on his business. Of course this does not even suggest that production of knitted outerwear comparable in quantity to that resulting from removal of homework restrictions will shift overseas, or that such overseas employers will be able to compete as effectively in United States' markets as they would if operating within the United States as homework employers. Moreover, other evidence cited by the appellees—testimony by a homework employer that if restrictions are resumed he would cease business altogether—directly supports the conclusion that restrictions would reduce the unfair competition of which the appellants complain. The risk of employers moving abroad also seems minimal when one considers that the appellants are only seeking reimposition of the status quo (as it existed prior to 1981). The record does not indicate that knitted outerwear businesses moved overseas in large numbers during the forty years that homework was restricted and one would not expect—absent persuasive evidence in the record—that a reimposition of these restrictions after only a two-year hiatus would suddenly lead to a substantial exodus of domestic businesses.

the Act partly to provide redress to employers from unfair competition, the suggestion that effective enforcement of the Act will not have this effect directly contravenes the congressional judgment underlying the Act.

In short, Congress intended to afford protection to both the employers and employees who are represented in this lawsuit. There is no reason in the present case for the appellants to be denied judicial review to assure that this intent is reasonably being effectuated.[29]

III. Discussion

A. *Scope of Review*

Both parties agree that the rescission was informal, notice-and-comment rulemaking conducted pursuant to section 4 of the APA, 5 U.S.C. § 553 (1982), and as such is to be found unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (1982). *See, e.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2865 (1983); *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413, 1422 (D.C. Cir. 1983). However, the parties vigorously dispute the rigor with which this test should be applied when a court reviews an agency's rescission of longstanding policy.

This case is a classic example of an agency attempt to modify a longstanding policy by rescinding regulations embodying that policy. In our view, whatever questions may have existed with respect to the proper standard of judicial review of such actions were put to rest last term when the Supreme Court decided *Motor Vehicle Manufacturers Association*. In that case, involving rescission

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[29] Because we decide that the manufacturers, manufacturers' associations and labor organizations have standing, we need not decide the standing of other appellants in this action. *Watt v. Energy Action Int'l Found.*, 454 U.S. 151, 160 (1981).

by the National Highway Traffic Safety Administration (hereinafter "NHTSA") of a regulation requiring installation of passive restraints in motor vehicles produced after 1982, the Court rejected the suggestion that rescission was analogous to agency inaction, which is judged by an unusually narrow standard of review. The Court indicated that "revocation of an extant regulation is substantially different than a failure to act," 103 S. Ct. at 2866, reasoning that

> [r]evocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808, 93 S.Ct. 2367, 2374-2375, 37 L.Ed.2d 350 (1973).

Id.

While the Court recognized that an agency must be given latitude to adapt its rules to accommodate changing circumstances, it noted that these changes "do not always or necessarily point in the direction of deregulation." *Id.* "In the abstract, there is no more reason to presume" that such changes require "rescission of prior action, instead of a revision in or even the extension of current regulation." *Id.* Hence, the Court concluded that if there is "a presumption from which regulation should start, that presumption—contrary to petitioner's views—is not *against* safety regulations, but *against* changes in current policy that are not justified by the rulemaking record." *Id.* In other words, the standard of judicial review is *not* altered by the fact that the agency has rescinded a regulation, rather than moved in some other direction. *Id.*

We find the Court's reasoning particularly compelling as applied to the case at hand, since this case involves

review of an agency's rescission of a longstanding policy.[30] The Division's decision in 1942 to restrict homework was an outgrowth of many years of unsuccessful attempts by state and Federal officials to regulate homework. These officials, and commissions reviewing their efforts, concluded that even the most vigorous enforcement efforts could not prevent violations of labor standards when homeworkers are used. The Division's comprehensive review of this experience led it to conclude that restricting homework was the only effective way to enforce the minimum wage in the knitted outerwear industry, and this position was adhered to by the Division for almost forty years. This settled course of behavior truly embodied the Division's informed judgment that restricting homework would best carry out the policy dictated by Congress.

The appellees' suggestion that the restrictions on homework were not seriously reexamined for forty years and that this should narrow our review of the rescission of the restrictions is untenable. As we have explained, the relative efficacy of regulation and restriction received substantial attention for many years prior to adoption of the homework restrictions, and was exhaustively studied by the Division in 1942. The Division also studied violations of the Act by employers of homeworkers in 1959, to obtain information "to aid development of a more effective enforcement program." 1959 REPORT, *supra*, at 1, *reprinted in* II J.A. 475.

The Division's adherence to the restrictions between 1942 and 1980 is a reflection of the widespread and persisting decision that restriction of homework was a prerequisite to effective enforcement of the Act. This sup-

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[30] The regulation at issue here was in effect for almost forty years. In contrast, the regulation involved in *Motor Vehicle Mfrs. Ass'n* had been promulgated four years prior to its rescission and had not actually taken effect (since the requirement only applied to future car models).

port for the restrictions is evidenced by comments received from five Secretaries of Labor, serving a number of administrations between 1960 and 1981, and from the Administrator of the Division from 1958 to 1969, voicing strong opposition to the proposed rescission and arguing that the need for restriction of homework is just as compelling today as it was in 1942.[31]

This consistent support for the restrictions is a sharp contrast to the situation reviewed by the Supreme Court in *Motor Vehicle Manufacturers Association*. There, the Court reviewed the rescission of a regulation which, over the course of its "complex and convoluted history," had been "imposed, amended, rescinded, reimposed, and now rescinded again." 103 S. Ct. at 2862. We cannot discern any rational basis for being less circumspect in reviewing the rescission of a regulation that has been uniformly supported since its adoption forty years ago, than the Supreme Court was in reviewing rescission of a highly controversial regulation.

Consequently, the normal standard of review, as articulated by the Supreme Court in *Motor Vehicle Manufacturers Association*, is applicable to this case. This review

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[31] *See* Secretaries' Comments, *supra* note 1, *reprinted in* I J.A. 172-77; Comments of Clarence Lundquist (June 18, 1981), *reprinted in* I J.A. 252-53. The persisting views of the Department were evident in a 1967 publication on labor laws:

> Homework defied regulation, and therefore poor working conditions and poor health standards have continued to flourish wherever homework itself was continued. No corps of inspectors has ever been or could be sufficiently large to inspect all the homes often enough to prevent widespread violation of child labor, minimum wage, or maximum hour standards, or to enforce safety and health provisions.

U.S. DEP'T OF LABOR, GROWTH OF LABOR LAW IN THE UNITED STATES 266 (1967), *quoted in* ILGWU Comments, *supra*, at 38, *reprinted in* II J.A. 336 (footnote omitted).

is focused and restricted, and it does not permit us to substitute our judgment for that of the agency.[22] 103 S. Ct. at 2866. "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 2866-67 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). We must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). An agency's decision will normally be found arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that

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[22] Our recent decision in *Building & Construction Trades' Dep't v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983), surely cannot be read (as the appellees appear to claim) to suggest a contrary rule. There, we were considering a party's claim that longstanding regulations promulgated pursuant to certain statutory language constituted a binding statutory construction by the agency. We held that while longstanding practice can be persuasive evidence when the interpretation of statutory language is involved, it carries much less weight when the statute affords agency discretion and the agency is merely choosing one of several reasonable ways to exercise its discretion. Unlike *Building & Construction Trades' Dep't*, the instant case does not involve a claim that the applicable statute precludes rescission of longstanding policy; instead, the issue is whether the rescission was "arbitrary and capricious." In any event, we need not even ponder the meaning of *Building & Construction Trades' Dep't*. As we have explained, our analysis of the issue in this case is strictly dictated by the Court's approach in *Motor Vehicle Mfrs. Ass'n*.

> it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Association, 103 S. Ct. at 2867.

Moreover, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 2870. Hence, this court may not supply a basis for the agency's action, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), or accept "appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Manufacturers Association*, 103 S. Ct. at 2870. However, we will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation Inc.*, 419 U.S. at 286.[22]

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[22] The appellees argue that a more deferential standard of review is required by the "experimental" nature of the rescission, and the fact that the rescission is based in part on a predictive judgment about the Secretary's enforcement capacity and the likely responses of employers and employees to alternative enforcement strategies. The latter argument, at most, counsels deference to the predictions made by the Secretary—it does not affect our review of aspects of reasoned decisionmaking that are unrelated to these predictions. Hence, we consider this argument *infra* in the more limited context in which it is relevant.

The "experimental" argument we can dispose of forthwith. First, the Secretary's expression of a willingness to modify the rescission if new information suggests that this is appropriate, 46 Fed. Reg. 50,349 (1981), hardly counsels any alteration in the standard of review. Agencies remain free to react to new information as part of their standard regulatory procedure, but their expressed willingness to do so certainly cannot insulate their decisions from meaningful judicial review. Unlike the experimental program in the case relied on by the appellees, *United Telegraph Workers v. FCC*, 436 F.2d 920 (D.C. Cir. 1970), the Secretary's action in this case did not have a fixed termination date.

Second, if the Secretary believed that significant uncertainties existed, he was obligated to identify these uncertain-

In short, our review of the Secretary's decision is not merely perfunctory. We are to engage in a "searching and careful" inquiry,[34] the keystone of which is to ensure that the Secretary engaged in reasoned decisionmaking. *American Public Gas Association v. FPC*, 567 F.2d 1016, 1029-30 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). *See also Motor Vehicle Manufacturers Association*, 103 S. Ct. at 2871 (indicating that agency's explanation "is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking"); *Specialty Equipment Market Association v. Ruckelshaus*, No. 81-1047, slip op. at 15 (D.C. Cir. Oct. 14, 1983) (when reviewing agency's determinations under "arbitrary and capricious" standard, "we must make a substantial and searching inquiry to ensure that the agency's decisions are the product of reasoned thought and based upon a consideration of relevant factors").

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ties and to explain why this justified rescission *prior* to "engaging in a search for further evidence." *Motor Vehicle Mfrs. Ass'n*, 103 S. Ct. at 2871. *See Small Refiner Lead Phase-down Task Force v. United States EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983) ("When the facts are uncertain, the Administrator 'should so state and go on to identify the considerations he found persuasive.' ") (quoting *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 476 (D.C. Cir. 1974)). The Secretary did not explain why such research would be more fruitful if homework restrictions in the knitted outerwear industry are lifted. Just as we do not have the expertise required to substitute our judgment for the Secretary's, we do not have the expertise to fill significant omissions in the Secretary's reasoning. *See Motor Vehicle Mfrs. Ass'n*, 103 S. Ct. at 2874 ("[I]t is the agency's responsibility, not this Court's, to explain its decision."). Finally, even were the appellees' argument accepted, it again would not remove all aspects of the Secretary's decision from the ordinary scope of review. For example, the desire to experiment would not excuse the Secretary's failure even to consider the alternatives discussed *infra*.

[34] *Small Refiner Lead Phase-down Task Force*, 705 F.2d at 520 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

B. *Failure to Consider Alternatives*

The record before this court makes it clear that the Secretary failed to provide any explanation for his implicit rejection of alternatives to elimination of restrictions on homework. Therefore, in light of *Motor Vehicle Manufacturers Association*, we are constrained to hold that the Secretary's failure to consider such alternatives, and to explain why such alternatives were not chosen,[35] was arbitrary and capricious, in violation of section 10(e) of the APA, 5 U.S.C. § 706(a) (1982).

There is little dispute about the availability of less far-reaching choices than complete rescission of homework restrictions in the knitted outerwear industry. Indeed, two possible choices were identified in the Department's notice of the Vermont and Washington, D.C. hearings. In that notice the Secretary requested information on "[w]hether the certificate requirements should be revised to recognize additional circumstances justifying certification, such as child care and other family demands that may tend to preclude factory employment," and "[w]hether the certificate requirements should differentiate between urban and rural areas." 45 Fed. Reg. 80,556 (1980).

During the hearings, and in the comments received later, there was substantial testimony which could have led the Secretary to opt for such modifications of the existing restrictions, rather than complete rescission. In

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[35] Following the Supreme Court's lead in *Motor Vehicle Mfrs. Ass'n*, we hold that an agency's failure to "cogently explain why it has exercised its discretion in a given manner," 103 S. Ct. at 2869, renders its decision arbitrary and capricious. Alternatively, our decision also rests on § 4(b) of the APA, 5 U.S.C. § 553(c) (1982), which requires that the agency provide an adequate statement of basis and purpose. *See Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1215-16 (D.C. Cir.), *opinion supplemented by* 713 F.2d 795 (D.C. Cir. 1983).

fact, the testimony challenging the restrictions predominantly related to the hardship that the restrictions imposed in *rural* Vermont. There was ample testimony indicating that the situation in Vermont was substantially different than that existing in more urban states and necessitated different treatment.[36] Specific proposals were advanced that would have permitted accommodation of these differences by means short of complete rescission of restrictions. The most detailed was a proposal submitted by the Attorney General of Vermont suggesting that the Secretary adopt a program whereby rural states meeting certain criteria could be authorized to certify homeworkers.[37] A comment from a Vermont Senator reiterated the possibility of expanding certification to permit homework by certain individuals whose circumstances precluded factory work.[38]

Perhaps the clearest indication that these proposals warranted serious consideration is provided by the Secretary's explanation of the rationale for rescission. In summarizing the evidence supporting rescission he said that commentators "cited the lack of adequate transportation, the need to remain at home to care for children and other family matters, as well as the lack of factory employment in most rural areas." 46 Fed. Reg. 50,348 (1981). He also indicated that "evidence was presented which showed that a continuation of the restrictions would have an adverse effect on employment opportunities, particularly in

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[36] *See* Office of Administrative Law Judges, U.S. Dep't of Labor, A Public Hearing to Commence Labor Department Review of "Homeworker Rules" 310 (Jan. 14, 1981) (hereinafter "Vermont hearings II"), *reprinted in* I J.A. 47 (statement of Marlene Walsh); Comments of Susan Auld (June 8, 1981), *reprinted in* I J.A. 237; Comments of John J. Easton, Jr. (Feb. 18, 1981), *reprinted in* I J.A. 135.

[37] Comments of John J. Easton, Jr. (Feb. 18, 1981), *reprinted in* I J.A. 137-46.

[38] Comments of Patrick J. Leahy (June 4, 1981), *reprinted in* I J.A. 229.

rural areas. . . . Much of this employment, the testimony and comments indicated, is in areas where public transportation is not available and few or no other gainful employment opportunities exist." *Id.* at 50,349. Obviously one potential means of redressing these concerns is to permit homework only in situations where these impediments to factory employment are shown to exist. The Secretary's explanation provides no basis whatsoever for rejecting this approach and instead allowing all individuals, in rural and urban areas, to engage in homework regardless of their circumstances.[39]

The Secretary's explanation of his decision does not provide the slightest indication that he gave any consideration to the alternatives raised in his original notice and the comments. Indeed, the affidavit of a Division official explaining the decision,[40] and the arguments of the appellees' counsel in this appeal,[41] make no claim that these alternatives received consideration.

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[39] While we believe that the fact that narrower options might have achieved the employment benefits sought by the Secretary is a sufficient basis for compelling consideration of these options, such consideration was also dictated by other concerns. At a minimum, the record would lead a rational decisionmaker to recognize some uncertainties about the Secretary's capacity to enforce the minimum wage if homework is not restricted, and this is particularly true in urban areas. *See* text at notes 45-70 *infra*. Given these uncertainties, the Secretary should have considered whether the restrictions should only have been lifted in situations where enforcement was most likely to be efficacious (*i.e.*, possibly in rural areas), or in those limited situations in which any risks created by these uncertainties were offset by a corresponding employment benefit.

[40] Affidavit of Arthur H. Korn, Chief, Branch of Special Minimum Wages, Wage & Hour Division, Dep't of Labor (Jan. 25, 1982) (hereinafter "Korn Affidavit"), *reprinted in* II J.A. 555-67.

[41] The appellees' only argument is that the Secretary did consider some different alternatives—*i.e.*, he considered lift-

It is absolutely clear from decisions by the Supreme Court and this court that such an "artificial narrowing of options," *Pillai v. CAB*, 485 F.2d 1018, 1027 (D.C. Cir. 1981), is antithetical to reasoned decisionmaking and cannot be upheld. Only last term the Supreme Court reaffirmed this principle in *Motor Vehicle Manufacturers Association*. There, NHTSA justified its rescission of a requirement that motor vehicles be equipped with either airbags or automatic seatbelts, by arguing that manufacturers were going to opt for automatic seatbelts and consumers would circumvent this option by detaching the seatbelts. The Supreme Court found this decision unreasoned and vacated the rescission. As we find in the instant case, the Court found that the agency's explanation could not justify its drastic decision to rescind rather than modify the standard to disallow the automatic seatbelts option. 103 S. Ct. at 2869 ("Even if this conclusion were acceptable in its entirety, standing alone it would not justify any more than an amendment of Standard 208 to disallow compliance by means of the one technology which will not provide effective passenger protection.") (citation omitted). The Court explained that "[a]t the very least this alternative way of achieving

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ing the rescission in all seven industries and doing so in a "non-experimental" fashion. Appellees' brief, pp. 62-63 n.38. However, the agency's consideration of some alternatives does not free it from considering other obvious alternatives. A contrary holding would provide agencies an easy means to circumvent this aspect of reasoned decisionmaking, since they could, according to the Government, avoid considering obvious and potentially viable alternatives simply by showing that they considered any alternatives at all.

We also note that the Secretary's mention of the alternatives discussed here in the notice of hearing does not in any way change the arbitrary and capricious nature of his failure to ever discuss them again. There is no question that the Secretary was aware of these options; the issue is whether he gave them sufficient consideration and adequately explained his decision.

the objectives of the Act should have been addressed and adequate reasons given for its abandonment." *Id.*

The Court in *Motor Vehicle Manufacturers Association* indicated that it did not "broadly require an agency to consider all policy alternatives in reaching [a] decision. It is true that a rulemaking 'cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been . . . .'" 103 S. Ct. at 2871 (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 551 (1978)). However, the options ignored by the Secretary in this case certainly cannot be characterized as "uncommon or unknown." These options were specifically mentioned in the notice of hearings and the comments received by the Secretary, and would be an obvious response to the concerns expressed by the Secretary.

Our decision in *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), is also analogous to the case at hand. In that case, we considered whether the FCC's decision to eliminate the requirement that licensees maintain programming logs and make those logs available to the public was arbitrary and capricious. We found that the Commission's failure "to give sufficient consideration" to the benefits of a more modest possibility—modification of log requirements to reflect more appropriately the informational needs of the Commission's new regulatory scheme—required remanding the Commission's decision on log requirements so that the Commission could undertake such an inquiry.[42]

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[42] *See also State Farm Mut. Auto. Ins. Co. v. Department of Transp.*, 680 F.2d 206, 230 (D.C. Cir. 1982) ("More important, NHTSA has failed to consider or analyze obvious alternatives to rescission, and has thus artificially foreclosed attempts to further the purpose of the Safety Act."), *vacated*

In *Action on Smoking and Health v. CAB*, 699 F.2d 1209 (D.C. Cir.), *opinion supplemented by* 713 F.2d 795 (D.C. Cir. 1983), we emphasized that in addition to requiring rational consideration of alternatives, the APA demands an adequate explanation when these alternatives are rejected. Hence, we vacated a decision by the Civil Aeronautics Board to rescind certain restrictions on smoking in airplanes because the Board had failed adequately to address alternatives proposed in the comments. We relied on the requirement of section 4(b) that an agency engaging in notice and comment rulemaking "shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1982). We indicated that while an agency "need not respond to every comment," *id.* at 1216, it must respond in a reasoned manner to " 'explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.' " *Id.* (quoting *Rodway v. USDA*, 514 F.2d 809, 817 (D.C. Cir. 1975) (footnote omitted)). The Board's claim that it had in fact considered the alternatives, and its attempt to rely on generalized and conclusory policy considerations as grounds for rejecting them, were inadequate: "[t]he Board must explain why a particular proposal is inconsistent with the balance between regulation and competition sought by the Board." *Id.*

In the same manner, we hold that the Secretary should have considered and explained why the proposals mentioned in his notice of hearing were inconsistent with the balance he sought between maximizing employment and effective enforcement of the minimum wage. We do not suggest that he had to opt for any particular one of these

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sub nom. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856 (1983); *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095, 1115 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); *Pillai v. CAB*, 485 F.2d 1018, 1027 (D.C. Cir. 1973).

proposals. However, he was required to address common and known or otherwise reasonable options, and to explain any decision to reject such options. His complete failure to satisfy these quintessential aspects of reasoned decisionmaking is the primary basis [43] for our decision to vacate his rescission of the restrictions in the knitted outerwear industry.

C. *Other Unreasoned Aspects of the Decision*

1. Enforcement Feasibility

Our decision to vacate is also grounded in the unreasoned nature of the Secretary's decision that an effective enforcement program would be feasible if restrictions on homework in the knitted outerwear industry were lifted. Before explaining the particular deficiencies in the Secretary's analysis, we shall summarize and review the evidence that was before the Secretary when he made this decision. We engage in this inquiry not in an effort to "upset the agency's view of the facts" [44] but instead to highlight "the limitations of this record in supporting the agency's decision." *Motor Vehicle Manufacturers Association*, 103 S. Ct. at 2871.

The evidence in the record supporting the Secretary's decision is at best minimal.[45] It comes primarily from

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[43] While the foregoing discussion provides the clearest basis for our holding that the Secretary's decision was arbitrary and capricious, the discussion in sections C1 & C2, *infra*, provides *independent* (rather than cumulative) reasons for our holding.

[44] Our inquiry could hardly be construed otherwise, since the agency's view of almost all of the facts discussed here is never indicated other than in the most general terms.

[45] This evidence is described in the appellees' brief, pp. 49-50. The Government does not mention the study by the Illinois Department of Labor, although this study was cited by the lower court. In view of the fact that 109 investigations in that study revealed 41 establishments in violation of one or

Vermont home knitters and their representatives who indicated that knitters were paid more than the minimum wage. These knitters often did not have records of the hours they worked [46]—in fact, some testified that factors such as distractions at home made estimating the number of hours virtually impossible [47]—and made no claims about the wages paid to homeworkers outside the rural setting of Vermont. The appellees also claimed that there were data showing that the homework restrictions did not reduce the incidence of violations of the Act. The explanations of these data by both the appellants and the appellees reveal that these data provide no meaningful support for this conclusion.[48]

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more labor laws, 349 violations of the Industrial Home Work Law, and 315 violations of the Illinois Minimum Wage Law, LABOR LAW ENFORCEMENT DIV., ILLINOIS DEP'T OF LABOR, THE ILLINOIS INDUSTRIAL HOMEWORK LAW/FEDERAL HOMEWORK REGULATIONS 16 (1980), *reprinted in* I J.A. 126, its results hardly compel its cursory recommendation that the Federal homework restrictions "are discriminatory" and should be removed. *Id.* at 21, I J.A. 132. The Secretary's decision does not reflect acceptance of this recommendation, since he rejected the lifting of restrictions in six of the seven restricted industries.

[46] Vermont hearings II, *supra* note 36, at 228-29, *reprinted in* I J.A. 27-28 (statement of Luelle Breen); *id.* at 264-65, I J.A. 40-41 (statement of Emma Pudvah).

[47] *Id.* at 257, *reprinted in* I J.A. 37 (statement of Virginia Gray); *id.* at 273-74, I J.A. 42-43 (statement of Peggy York).

[48] The appellees point to data showing that the percentage of complaints investigated that proved to be valid was virtually the same for homeworkers in restricted (68%) and non-restricted industries (61%), WAGE & HOUR DIV., U.S. DEP'T OF LABOR, SUMMARY OF WAGE AND HOUR DIVISION INVESTIGATIONS OF EMPLOYERS UTILIZING HOMEWORKERS BY RESTRICTED AND NONRESTRICTED INDUSTRIES (FY 1975-FY 1980), *reprinted in* II J.A. 553, and for factory workers, Korn Affidavit, *supra* note 40, at 6, *reprinted in* II J.A. 560. In essence, these data only reveal that employees generally do

Furthermore, as we have explained at length, substantial evidence is provided by years of enforcement experi-

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not file complaints unless they are well founded. It does not indicate the rate at which actual violations occur. The appellees themselves concluded, in response to the appellants' suggestion that the figures demonstrate significant minimum wage violations, that "[t]hey do not by any stretch of the data 'indicate a violation rate of over 60 [percent] for homeworkers in both restricted and non-restricted industries,' as plaintiffs charge. (Pl. Br. 38) Indeed, they do not identify any actual violation rate for either group of homeworkers." Appellees' brief, p. 54. This is significant because the "total misconstr[uction]" of the data that the appellees decry, *id.*, also appears to underlie the Secretary's understanding of the data. In describing the "process by which the Department of Labor reviewed the existing regulations," Arthur H. Korn, the Chief of the Division's Branch of Special Minimum Wages, explained that "[t]hese statistics indicated that the rate of minimum wage or overtime violations in homework was not significantly different in the restricted and non-restricted industries" and that "violations found in all investigations (factory and homework) . . . averaged approximately 68 percent, the same as the average rate of violation found in the restricted homework industries . . . ." Korn Affidavit, *supra* note 40, at 1, 6, *reprinted in* II J.A. 555, 560.

The Department's 1959 study provides somewhat stronger support for the Secretary's position. It found that "one out of six of the establishments employing howeworkers were in violation of the minimum wage, overtime, or child labor provisions of the [Act]," 1959 REPORT, *supra*, at 3, *reprinted in* II J.A. 477, that "three out of 10 homeworkers did not have the handbooks required by regulations," *id.*, that seven percent of all homeworkers "were found to be paid at less than the minimum wage during the profile workweek," *id.* at 8, II J.A. 482, and that "the incidence of violations of the minimum wage provisions was about the same in the group of restricted industries as in the group of non-restricted industries." *Id.* at 3, II J.A. 477.

However, the value of these data is limited. The conclusions are based on investigations by Division officials "who collected data by examining employers' records and interviewing the employers and some of the homeworkers." *Id.*

ence prior to imposition of the restrictions, and the Division's investigation in the early 1940's, which suggest that the minimum wage law cannot be effectively enforced unless homework is restricted. This conclusion is also supported by testimony at the 1981 hearings, and analysis in the subsequent comments, suggesting that the enforcement problems created by homework continue today. Comments received from five former Secretaries of Labor argued that lifting the restrictions would "turn America back to the dark ages of industrial inhumanity." Secretaries' Comments, *supra* note 1, *reprinted in* I J.A. 172, 174, 176. Opposition was also voiced by the former Administrator of the Division from 1958 to 1969.

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at 2, II J.A. 476. As the 1942 findings indicated, establishing violations when homeworkers are involved is an extremely onerous task. For example, it is complicated by the difficulty of identifying homeworkers, 1942 FINDINGS, *supra*, at 26, *reprinted in* I J.A. 92, and the fact that employers violating the Act may distort records so that homeworkers appear to receive the minimum wage. *Id.* at 21, I J.A. 87. Hence, it is not surprising that the findings in the 1959 report are qualified:

> The survey findings probably understate the degree of violation of the Fair Labor Standards Act by employers of homeworkers becaurse of the difficulty of determining the number of hours worked by homeworkers and whether or not children participated in the work. The violations shown are those which investigators could establish without an unreasonable expenditure of time.

1959 REPORT, *supra*, at 2, *reprinted in* II J.A. 476.

The appellants also challenge the significance of the finding that the incidence of violations involving homeworkers is the same in restricted and non-restricted industries. They argue that one would expect wage violations to be common *when homeworkers are used*—regardless of whether the industry is restricted or unrestricted—and that the relevant consideration is whether restrictions reduce the aggregate number of violations by causing homeworkers to be *used less often* in restricted industries. There was no indication that this possibility was considered by the Secretary, and we discuss the significance of this omission *infra*.

Comments of Clarence Lundquist (June 18, 1981), *reprinted in* I J.A. 252. Law enforcement officials in California, Connecticut and New York, all of whom must deal with large urban centers, argued that homework defies effective enforcement of the minimum wage unless restricted.[49] The record further reveals the concerns of a Regional Administrator of the Department's Employment Standards Administration:

> Additionally, homeworking is a perfect vehicle for utilizing and taking advantage of undocumented workers, it has been disclosed through investigations. Our many investigations covering manufacturing industries has [sic] also uncovered realistic examples

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[49] Office of Administrative Law Judges, U.S. Dep't of Labor, A Public Hearing to Commence Labor Department Review of "Homeworker Rules" 145 (Jan. 13, 1981) (hereinafter "Vermont hearings I"), *reprinted in* I J.A. 18 (statement of Donald DeFillippi, Assistant Director of the Division of Regulation of Wages, Connecticut Department of Labor) ("Where homework is being performed, there is absolutely no way to prevent the circumvention or evasion of and to safeguard the minimum wage."); Comments of William L. O'Toole (May 27, 1981), *reprinted in* I J.A. 198 ("Piecegoods contracting is a very highly competitive industry requiring little capital. The manufacturers, or 'jobbers', who give out the work are for the most part only interested in getting the cheapest price from their contractors and are quite ready to close their eyes to the conditions under which the work is done. The contractors are hard-pressed, sometimes making out little better than their employees. They are forced to cut their costs in every way possible, or they will simply not get the work. It would be surprising if widespread, systematic violation of the wage and hour laws did not result from these circumstances. Only systematic enforcement will correct these abuses. Removal of Part 530 will make systematic enforcement impossible."); Comments of Donald Vial (May 15, 1981), *reprinted in* I J.A. 158 ("Enforcement experience in California has demonstrated beyond any doubt that maintenance of minimum standards for Industrial Homework is practically impossible because workers will not step forward to complain because they fear losing their only means of survival.").

of the abuses of the industrial homework regulations, both state and federal.[50]

The record includes specific evidence indicating that homeworkers are typically paid subminimum wages. The Administrator of the Division of Labor Standards for the Rhode Island Department of Labor testified that "[w]hen we have interviewed home workers we have found that they are paid 10 to 70 percent of the prevailing minimum."[51] Similarly, a California enforcement official testified that he had yet to find a homeworker in Los Angeles County, Santa Clara County, or San Diego County who had been paid more than $2.25 an hour.[52]

These conclusions are buttressed by a 1980 action brought by the Department against a manufacturer who allegedly was illegally employing homeworkers in the knitted outerwear industry in Vermont. The complaint alleged willful and repeated violations of the minimum wage, overtime, compensation, and recordkeeping require-

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[50] State of New York Department of Labor Public Hearing on Industrial Homework 6 (April 2, 1981) (hereinafter "New York hearings"), *reprinted in* II J.A. 370 (statement of Frank Mercurio). *See also* Vermont hearings I, *supra* note 49, at 42 (statement of Arthur Korn) ("Our experience in enforcing the minimum wage law and that of states who have had experience in that area have found that maintaining the minimum wage for homeworkers is still a problem, a continuing problem.").

[51] Office of Administrative Law Judges, U.S. Dep't of Labor, A Public Hearing to Commence Labor Department Review of "Homeworker Rules" 118 (Feb. 18, 1981) (hereinafter "Washington, D.C. hearings I"), *reprinted in* I J.A. 66 (statement of Roberta F. Orticerio).

[52] Office of Administrative Law Judges, U.S. Dep't of Labor, A Public Hearing to Commence Labor Department Review of "Homeworker" Rules 412 (Feb. 17, 1981) (hereinafter "Washington, D.C. hearings II"), *reprinted in* I J.A. 54 (statement of Joe Razo).

ments of the Act.[53] An accompanying affidavit from a compliance officer in the Division indicates that the Division's investigation revealed that "a total of $40,673.05 in back wages is due 58 homeworkers." [54] This number is substantial in light of a Vermont official's testimony that there are only 200 to 400 homeworkers in Vermont.[55]

The appellees' defense of the Secretary's determination that enforcement would be feasible is predicated on their belief that determinations of this type—which involve assessment of the Department's enforcement capacity and predictive judgments about the utility of certain enforcement techniques—"are unquestionably committed to the discretion of the agency charged with protecting those interests, not to courts or litigants." Appellees' brief, p. 42. We agree with the appellees that this court must be particularly deferential when reviewing an agency's predictive judgments about areas that are within the agency's field of discretion and expertise. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978); *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961); *Building & Construction Trades' Department v. Donovan*, 712 F.2d 611, 629 (D.C. Cir. 1983). However, we reject the appellees' position insofar as they would treat the predictive nature of the judgment "as though it were a talisman under which any agency decision is by definition unimpeachable."

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[53] Plaintiff's Complaint at 2-3, *Marshall v. C.B. Sports, Inc.*, Civ. No. 79-299 (D. Vt. filed Feb. 7, 1980), *reprinted in* II J.A. 599-600.

[54] Affidavit of Michael J. Leclair, Compliance Officer, Wage & Hour Division, U.S. Dep't of Labor (Dec. 23, 1980), *reprinted in* II J.A. 601.

[55] Washington, D.C. hearings I, *supra* note 51, at 68, *reprinted in* I J.A. 61 (statement of Joel Cherington).

Motor Vehicle Manufacturers Association, 103 S. Ct. at 2870 (referring to rule that court may not impose additional procedural requirements upon an agency).

The Supreme Court has never indicated that when an agency is making a predictive judgment it need not engage in reasoned decisionmaking.[56] Because new agency

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[56] The appellees rely on Supreme Court cases reviewing the Federal Communications Commission's (FCC's) implementation of the Communications Act's "public interest, convenience, and necessity" standard. 47 U.S.C. §§ 309(a), 310(b) (1976). In these cases, the Court has held that "complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 814 (quoting *FCC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)). *Accord FCC v. WNCN Listeners Guild*, 450 U.S. at 594-95.

However, the suggestion that such determinations are entitled to deference and do not require *complete* factual support does not mean that agencies are free to engage in unreasoned decisionmaking. Specifically, there is no indication in these cases that agencies can ignore important factors in making predictions, or can reach judgments that are irrational given the relevant evidence in the record. To the contrary, in *WNCN Listeners Guild*, the Court found that the FCC "has provided a rational explanation for its conclusion," 450 U.S. at 595, and that its position "reflects a reasonable accommodation" of the competing policy considerations. *Id.* at 596. Similarly, the factual determination that underlay the FCC's policy choice in *National Citizens Comm. for Broadcasting* "was grounded in a rational prediction, based on its knowledge of the broadcasting industry and supported by comments in the record." 436 U.S. at 808. *Cf. FCC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. at 29-30 (holding that Commission's forecast about effect of certain conduct on future prices "necessarily involves deductions based on the expert knowledge of the agency," but also noting that a considerable showing was made that the forecast was well grounded and that "as

policies often will involve some element of prediction about the future effects of those policies, the arbitrary

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a matter of common sense," the correctness of the forecast was difficult to deny).

We also have some question about whether the deference shown to FCC decisions is necessarily appropriate for all predictive judgments by agencies. As the Supreme Court has previously noted, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). *See also United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (Congress acted in a field that was new and dynamic and gave Commission expansive powers); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir.) ("The substantial discretion generally allowed the F.C.C. in determining both what and how it can properly regulate, is often attributed to the highly complex and rapidly expanding nature of communications technology."), *cert. denied*, 425 U.S. 992 (1976).

The Court's decision in *Motor Vehicle Mfrs. Ass'n* also suggests that predictive judgments by agencies must be reasoned. In that case, the Court reviewed NHTSA's determination that it could not "reliably predict" that automatic seat belts would increase belt usage by five percent, 103 S. Ct. at 2871, to see if the agency's claim of uncertainty was supported by the record and reasonably explained. *Id.* The Court found that the agency's statement "take[s] no account of the critical difference between detachable automatic belts and current manual belts. . . . Whether [the possibility that the inertia factor which favors usage when automatic belts are installed will substantially increase seatbelt use] is in fact the case is a matter for the agency to decide, but it must bring its expertise to bear on the question." *Id.* at 2872. In our view, there is no reason for greater deference when an agency decides that data does permit a certain prediction than when it reaches the contrary conclusion. In either case, courts are capable of following the approach employed in *Motor Vehicle Mfrs. Ass'n* to ascertain whether the agency's decision is based on a consideration of relevant factors and is otherwise a product of reasoned decisionmaking.

and capricious standard of judicial review would be effectively nullified if a court seriously entertained the position espoused by the appellees. The presence of an element of prediction is particularly likely when such policies involve dramatic departures from longstanding policy, and yet it is evident that such policies are not immune from judicial review. The implication that such decisions are completely insulated from meaningful judicial review ignores the Supreme Court's admonition that "'*expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" *Motor Vehicle Manufacturers Association*, 103 S. Ct. at 2869 (quoting *New York v. United States*, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting)).[57] While we respect an agency's superior position to make judgments involving elements of prediction, we will review the record and the agency's decision to assure that "it identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation." *Telocator Network of America v. FCC*, 691 F.2d 525, 544 (D.C. Cir. 1982).[58]

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[57] *See generally Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) ("Expert discretion is secured, not crippled by the requirements for substantial evidence, findings and reasoned analysis. . . . A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent. 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia.'") (quoting *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272, *modified by order*, 392 U.S. 901 (1968)), *cert. denied*, 403 U.S. 923 (1971).

[58] We note also that the appellees' request for "extreme deference" is particularly dubious in a case such as this, where

Our review of the record and the Secretary's explanation of his decision indicates that the Secretary has not given sufficient consideration to factors that may be highly relevant to the Department's ability to enforce the Act without homework restrictions. Initially, there is no indication that the Secretary gave any serious consideration to the possibility that lifting restrictions would substantially increase the number of homeworkers.[59] This failure is important because the Secretary's judgment that the Division's staff could enforce the Act was explicitly based on his view "that homeworkers will comprise only a small percentage of the approximately 63,000 production employees in this industry . . . ." 46 Fed. Reg. 50,349 (1981).[60]

There is certainly a very real possibility that the number of homeworkers will substantially increase because of the rescission of restrictions. *See Gemsco, Inc. v. Walling*, 324 U.S. 244, 254 n.17 (1945) ("Under the National Industrial Recovery Administration, 118 of the 556 codes included homework provisions; and 86 percent of the 118 prohibited homework. Homework in consequence was

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the agency's prediction relates to the efficacy of a policy that has been tried unsuccessfully in the past, and when the record contains statements by a number of state enforcement officials and former leaders of the agency suggesting that the policy will not be effective.

[59] We are unwilling to conclude that the Secretary's general and wholly unverified conclusion that "it appears" that the number of homeworkers will be small, 46 Fed. Reg. 50,349 (1981), reflects sufficient consideration of the possibility that the number will increase. *See Action on Smoking and Health*, 699 F.2d at 1217 ("We are told that the decision was made '[a]fter considering the outstanding proposals,' yet no evidence of that consideration is given. To accept the Board's action would render judicial review of informal rules meaningless.").

[60] Additionally, this consideration is relevant to whether restrictions have reduced the aggregate number of violations of the Act when homeworkers are used, by decreasing the number of homeworkers. *See* note 48 *supra*.

greatly reduced, but its volume turned sharply upward when the National Industrial Recovery Act was declared unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)."). As the appellees point out, approximately thirty percent of knitwear employees were homeworkers in 1942, but today only 1.6% of them are. Appellees' brief, p. 10. While the causal relationship between restriction and this decline is speculative, even the appellees appear to acknowledge that it is logical to assume the existence of such a relationship.[61] Indeed, this assumption appears implicit in the very basis for the Secretary's decision: rescission is necessary to avoid "substantial curtailment of employment opportunities." 46 Fed. Reg. 50,349 (1981). Obviously, this curtailment is only avoided if rescission results in a greater number of employees in homework than is the case under the restrictions.[62] Additionally, even if the percentage of knitted outerwear employees that are homeworkers rises to only forty percent of the 1942 level, the number of

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[61] Appellees' brief, p. 56 ("It was, of course, logical to assume that homework was a more widespread phenomenon in 1942, since at that time homework had not been outlawed for 40 years, as is the case today.").

[62] The appellees recognize the potential contradiction in the Secretary's position and argue that the Secretary could rationally have found that rescission would increase the number of homeworkers—and hence employment—but would not increase it so dramatically that enforcement of the Act would be impossible. However, the Secretary's explanation of his decision does not provide any indication that he was aware that his predictions yielded potentially incongruous results, or that he made a *reasoned* decision that the number of homeworkers would fall within the middle ground suggested by the appellees. Moreover, we cite the Secretary's employment finding only as additional evidence of the possibility that the number of homeworkers would increase following restrictions, which, when evaluated in conjunction with other reasons to suspect that this might happen, leads us to conclude that the Secretary should have considered this possibility.

homeworkers would be the same as in 1942 because of increases in the industry's total employment.[63]

The Secretary also failed to give adequate consideration to the differences between enforcing the Act when homeworkers are used in rural areas and when they are used in urban areas. As we have noted, much of the evidence on which the Secretary's determination was based came from the testimony and comments of individuals from rural Vermont.[64] Some of this testimony, and much of the testimony from enforcement officials in more urban states, emphasized the substantial differences between rural and urban areas, and indicated that the conditions requiring restrictions in urban areas were not duplicated in rural areas.[65] In particular, it was suggested that the

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[63] The industry employs 63,000 production workers today, 46 Fed. Reg. 50,349 (1981), compared to "22,500 wage earners on manufacturing processes and an additional 2,100 salaried employees" in 1939. 1942 FINDINGS, *supra*, at 6, *reprinted in* I J.A. 72 (footnote omitted).

[64] The Commissioner of the Vermont Department of Employment Security testified that "[b]y some definitions, Vermont is considered to be the most rural state in the nation. Only eight of its 246 communities have populations over 10,000, and Burlington, its largest city, has fewer than 50,000 people." Washington, D.C. hearings I, *supra* note 51, at 55, *reprinted in* I J.A. 60 (statement of Sandra Dragon).

[65] Washington, D.C. hearings I, *supra* note 51, at 65-66 (statement of Joel Cherington) (By permitting homework where workers are not within a mile of public transportation "the Department would be able to distinguish between homework in heavy congested urban areas, such as New York and Los Angeles, and homework conducted in rural states such as Vermont. If the principal problem addressed by Regulation 530 is the exploitation of immigrant workers in our major cities, as I believe it is, my suggestion would enable that problem to be addressed without disrupting Vermont and other state's economy [sic]."); Washington, D.C. hearings II, *supra* note 52, at 410, *reprinted in* I J.A. 52 (statement of Joe Razo) ("I wish some of the ladies who say they are earning more than the minimum wage on the piece rate basis would come to California. We need experienced operators, but you will

greater numbers of undocumented workers in urban areas, sometimes having low incomes and obviously in no position to complain if employers mistreat them, created a serious enforcement problem. There was also testimony that immigrants are particularly susceptible to subminimum wages because of language barriers and cultural differences.[66] It is also possible that in rural areas enforcement officials are less likely to experience problems such as "[t]he constant change in address of low-income families and the high turnover in home work employees" which were reported as impediments to enforcement by the Administrator in his 1942 findings. 1942 FINDINGS, *supra*, at 26, *reprinted in* I J.A. 92.

We do not mean to suggest that these possibilities are grounded in fact, or that the Secretary was obligated in his ultimate decision to differentiate between rural and urban areas. However, there are obvious and substantial

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quickly find that your price will be undercut by the recently arrived immigrant from Korea, from Hong Kong, from Cambodia, from Tailand [sic], and more recently, the Vietnamese. If they do not undercut your wage, then we have the tremendous influx of undocumented workers from Mexico."); Comments of John J. Easton, Jr. (Feb. 18, 1981), *reprinted in* I J.A. 135 ("My amendment also recognizes that the exploitation which gave rise to Part 530 does not accurately pertain to all homework and is a destructive over-generalization when applied to Vermont. Our culture, climate, settlement patterns and economics make homework a necessary and dignified employment possibility for many of our citizens."); Comments of William L. O'Toole (May 27, 1981), *reprinted in* I J.A. 197, 198 ("Removal of Part 530 would create a strong positive incentive for the hiring, and exploitation, of illegal aliens and welfare abusers, rather than the honest citizens and legitimate immigrants who would not fear to complain about subminimum wages. . . . A problem that arises when the rules are applied specifically in rural areas, provides no basis for the sweeping elimination of regulations which have their principal impact in urban areas.").

[66] *See* Comments of William L. O'Toole (May 27, 1981), *reprinted in* I J.A. 197.

differences between rural and urban areas, and there was substantial evidence in the record indicating that some of these differences were highly relevant to enforcement of the Act when homeworkers are employed. Consequently, the Secretary's failure even to consider these differences, particularly in light of his significant reliance on testimony from individuals in rural Vermont, was not reasoned decisionmaking.

Finally, we do not think that the Secretary's explanation reflects sufficient consideration of the specific impediments to enforcement of the Act presented by homework. The Administrator's 1942 findings identified numerous obstacles to previous enforcement efforts when homeworkers are used and explained that these are *intrinsic* features of homeworker employment. These included the difficulty of identifying and locating workers that are employed as homeworkers, a problem that would seem most likely when employers have been violating the Act and may wish to impede enforcement. The 1942 findings also indicated that it was difficult to ascertain the number of hours worked by individual homeworkers, even when employers are acting in good faith. Other problems were identified in the findings, and the appellees do not point to any specific evidence in the record suggesting that these impediments are less likely to exist today.

The Secretary's explanation of his decision does not address these concerns. Instead, the Secretary argues that because of increased acceptance of the minimum wage, and the developing expertise of his enforcement officials, a "concerted compliance program" [67] by the Department will

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[67] On appeal, the appellees included in their brief a number of documents delineating the nature of this compliance effort. This inclusion is somewhat surprising because the Secretary's announcement of the rescission contains no indication that the basis for this action included consideration of particular —but unspecified—enforcement plans. Moreover, the Supreme Court has indicated that in applying the "arbitrary and capricious" standard, "the focal point for judicial re-

insure effective enforcement of the Act.[68] The Secretary's statements are unsupported by the record [69] and, in effect,

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view should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Nevertheless, we need not decide whether this evidence could not be used to support the Secretary's decision, because even if it is considered it does not change the result in this case. There is no indication that the strategies revealed in the document —generally, use of time studies and piece rates, education of homeworkers, and intensified investigative efforts—are materially different than those strategies attempted without success by the states and the Federal Government prior to the imposition of restrictions. Nor is there any indication of why such strategies can overcome the specific impediments to enforcement that traditionally have been viewed as insuperable.

[68] The Secretary's explanation of his decision does not include the suggestion he made in the notice of proposed rulemaking that homeworkers would be more likely to report violations if restrictions were lifted. 46 Fed. Reg. 25,109 (1981). Because the Secretary did not mention this possibility as a basis for his decision, the appellees' attempt to resurrect it is unavailing. Indeed, it should also be noted that the record includes an explanation of why such an increase in reporting is not likely to occur. Comments of William L. O'Toole (May 27, 1981), *reprinted in* I J.A. 197.

[69] We have already noted that the Secretary's suggestion that the number of homeworkers will be small is not the product of reasoned decisionmaking. The Secretary also suggested that there is greater acceptance of the minimum wage today than there was in 1942. 46 Fed. Reg. 50,349 (1981). We do not find this proposition as self-evident as the appellees suggest, and the appellees cite no supporting evidence in the record other than the testimony of the Vermont home knitters regarding their own experiences. Appellees' brief, pp. 52-53. However, there was also evidence in the record, including references to the Department's own investigation of CB Sports, Inc., suggesting that payment of subminimum wages to employees is pervasive. Hence, even assuming *arguendo* that there is general acceptance of the minimum wage, there is little question that violations continue, and the relevant issue

ask us to accept the Secretary's conclusory assurances and to assume that the impediments to enforcement of the Act which were considered "inherent in the home work

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is whether enforcement efforts can prevent them if homework is unrestricted.

The Secretary also suggested that enforcement was not possible in 1942 because the Department was newly established. However, regulation of homework was certainly not a new phenomenon in 1942; the Department had years of prior state and Federal experience to draw on. The record also indicates that even the most intensive enforcement efforts by state and Federal bodies had not effectively controlled substandard labor practices in homework. Again, the appellees do not point to anything in the record suggesting that the Department's "new" concerted compliance effort really contains anything "new" at all. Moreover, a recent study by the General Accounting Office, quoted by the International Ladies' Garment Workers' Union in its comment on the proposed rescission, calls into question the Department's present enforcement capacity:

> [The Department of] Labor's investigations of establishments demonstrate that non-compliance with FLSA recordkeeping, minimum wage, and overtime provisions is a serious and continuing problem. Labor is able to investigate annually only a small percentage of firms covered by the act. For example, in 1979 Labor investigated less than 2 percent of the 4.1 million establishments with paid employees subject to FLSA provisions. The number of covered establishments was last determined by Labor in 1977. Although Labor attempts to act on all FLSA complaints received, the complaint backlog has remained fairly constant—between 21,000 and 25,000—during the 3 fiscal years ended [sic] 1979.

COMPTROLLER GENERAL OF THE UNITED STATES, CHANGES NEEDED TO DETER VIOLATIONS OF FAIR LABOR STANDARDS ACT, A REPORT TO THE CONGRESS 4 (May 28, 1981), *quoted in* ILGWU Comments, *supra*, at 62, *reprinted in* II J.A. 360 (footnote omitted).

In evaluating these considerations, we respect the Secretary's expertise in ascertaining the enforcement capacity of his staff. However, as we have indicated, our deference to his expertise "cannot be allowed to slip into a judicial inertia."

practice" in 1942, 1942 FINDINGS, *supra*, at 26, *reprinted in* I J.A. 92, have disappeared with the passage of time.

We do not believe that the Secretary was free to ignore the specific impediments identified in the 1942 findings, and we also may not ignore them. Acceptance of the Secretary's claims would be an abdication of our responsibility to see that he has engaged in reasoned decisionmaking. This we refuse to do.[70] Because of the Secretary's failure to consider adequately factors identified in this subsection, his judgment that removing restrictions would not prevent effective enforcement of the Act was arbitrary and capricious and cannot be upheld.

2. Curtailment of Employment

While the Secretary's decision was significantly motivated by his finding that substantial curtailment of employment opportunities would result from continued restrictions in the knitted outerwear industry, we find his abbreviated analysis of this issue completely inadequate. The Secretary's explanation of his view evidences no serious consideration of whether any employment benefits from rescinding restrictions will be offset by resulting em-

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Volkswagenwerk Aktiengesellschaft, 390 U.S. at 272 (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). In light of the minimal evidence in the record supporting his position, we think it clear that the Secretary's generalized claims about enforcement capacity and changing attitudes cannot justify his failure to address the specific impediments to enforcement revealed by the Department's exhaustive analysis in 1942.

[70] *See Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1442 (D.C. Cir. 1983) (refusing to accept the FCC's "conclusory assurances" that its ability to regulate would not be diminished by changes that included elimination of the requirement that radio licensees maintain programming logs; vacating because "the Commission has failed to give adequate consideration to the vital information role that the logging requirements presently serve in the overall scheme of the Communications Act").

ployment losses and reductions in the earning power of factory workers.

Initially we note that our analysis of this specific deficiency in the Secretary's analysis is confounded by the Secretary's failure to articulate satisfactorily even the most rudimentary aspects of his findings. Specifically, it is not at all clear whether the Secretary's finding that the restrictions curtailed employment opportunities means that: (1) restrictions jeopardized *existing* illegal employment of homeworkers; (2) restrictions foreclosed *additional* opportunities in homework; or (3) restrictions did not affect *actual* employment, but were removed to legalize the status of existing homeworkers. While the lower court believed that the Secretary's finding was predicated on the second rationale,[71] the connection between the facts cited by the Secretary (*i.e.*, that many people *currently* work as homeworkers) and such a finding is mystifying. Because of other deficiencies in the Secretary's reasoning regarding the employment benefits of rescission, discussed *infra*, it is unnecessary for us to decide whether the ambiguity as to his actual finding requires reversal. We highlight them because they illustrate the difficulties this court would face if it attempted to fill in the numerous gaps in the Secretary's reasoning. In effect, to cure the deficiencies in the Secretary's analysis we would be required to substitute our reasoning for the patently superficial explanation provided by the Secretary.

Assuming that the Secretary reasoned that without restrictions more homeworkers would be employed in the knitted outerwear industry, he did not adequately consider the possibility that this employment increase would be offset by economic injury to factory workers. The record included testimony and comments suggesting that such injury would result because homework competition

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[71] *International Ladies' Garment Workers' Union v. Donovan*, Civ. No. 81-2606, mem. op. at 11 (D.D.C. July 23, 1982), *reprinted in* II J.A. 613.

would reduce factory wages and employment,[72] and some manufacturers would be unable to compete and would be driven out of business.[73] Hence, the employment "benefit" of the rescission might simply be a shift in employment from factories to homes, with no *net* increase in employment opportunities.

The Secretary's only response was that "these comments did not present adequate substantiating evidence." 46 Fed. Reg. 50,349 (1981). While this response is accurate, it does not constitute sufficient consideration of the concerns raised in the comments. The appellees do not question the appellants' claim that the Secretary's decision is premised on his desire to increase net employment opportunities, or their claim that this required the Secretary to consider both the employment benefits and detriments of the Secretary's decision. In the circumstances of this case, this responsibility required the Secretary to do more than simply dismiss the concerns raised in the comments because of their lack of substantiating evidence.[74] As the

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[72] *E.g.*, Comments of National Hand Embroidery & Novelty Mfrs. Ass'n (May 20, 1981), *reprinted in* I J.A. 166-67 (lifting restrictions will cause average wage in industry to fall to Federal minimum so that employers can compete with homework employers); Comments of AFL-CIO Executive Council (May 7, 1981), *reprinted in* I J.A. 204 (removal of restrictions will encourage employers to divert work from factories to unprotected homeworkers).

[73] *E.g.*, Comments of Wisconsin State AFL-CIO (June 23, 1981), *reprinted in* I J.A. 259 (revocation of prohibition on homework in garment industry "would result in legitimate businesses being forced to close"); Comments of Ass'n of Knitted Fabrics Mfrs., Inc. (May 7, 1981), *reprinted in* I J.A. 153 (removal of restrictions would result in unemployment and may drive small manufacturers out of business).

[74] *Cf. National Lime Ass'n v. EPA*, 627 F.2d 416, 443 (D.C. Cir. 1980) (where EPA had statutory duty to promulgate achievable standards and this required analysis of relevant variables, industry's failure to provide data or assist in analysis in any meaningful way did not lift "the burden from the Agency of pursuing what appears to be a relevant variable

appellees repeatedly point out, this is a case where only a limited amount of hard data exists and the Secretary had to make a decision largely in the absence of such data. This factor, however, cuts in both directions. As the Secretary did not feel constrained by the absence of such data in predicting that rescission would provide substantial employment benefits, we cannot fathom his failure seriously to consider offsetting detriments solely on the ground that this possibility was not substantiated by hard data.

The possibility of employment detriments resulting from unrestricted homework is a serious concern and deserves the Secretary's careful consideration. As we have said, the record contains substantial evidence suggesting that homeworkers will be paid subminimum wages, and one of the reasons the Act was passed was to protect all employers and employees from the economic consequences of subminimum wages. Moreover, even if homeworkers are hired and paid lawful wages, this in no way suggests that employees in the industry as a whole will be benefitted.[75]

The Secretary's explanation of the employment consequences of rescission does not begin to address these concerns.[76] In the absence of such analysis, we believe it is

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or at the least discussing in its document why it was not considered important").

[75] *See, e.g.*, New York hearings, *supra* note 50, at 100, 101, *reprinted in* II J.A. 376, 377 (statement of Frank Mercurio).

[76] As we have explained, the responsibility for consideration and discussion of such concerns is the agency's, and not this court's. Hence, it would not be proper for us to follow the lead of the District Court and speculate that "it is also possible that a net gain in jobs, either due to cost savings or to sales by employers of homeworkers that were formerly lost to foreign competition, could be realized." *International Ladies' Garment Workers' Union v. Donovan*, Civ. No. 81-2606, mem. op. at 11 (D.D.C. July 23, 1982), *reprinted in* II J.A. 613. The District Court's speculation is also hard to reconcile with its earlier speculation that the number of homeworkers has de-

clear that the Secretary's decision was arbitrary and capricious.

CONCLUSION

We recognize that a new administration may try to effectuate new philosophies that have been implicitly endorsed by the democratic process. Nonetheless, it is axiomatic that the leaders of every administration are required to adhere to the dictates of statutes that are also products of democratic decisionmaking. Unless officials of the Executive Branch can convince Congress to change the statutes they find objectionable, their duty is to implement the statutory mandates in a rational manner. *See Motor Vehicle Manufacturers Association*, 103 S. Ct. at 2875 n.* (Rehnquist, J., concurring) ("Of course, a new administration may not choose not to enforce laws of which it does not approve . . . .").

The Fair Labor Standards Act was passed to protect employees and employers from the consequences of oppressive wages. The Secretary's failure to engage in reasoned decisionmaking before rescinding a longstanding tool for enforcing the Act has imperiled the attainment of this objective in an industry employing 63,000 workers. This abdication of his statutory responsibility cannot survive judicial scrutiny.

For the foregoing reasons, we reverse the decision of the District Court and vacate the Secretary's rescission of homework restrictions in the knitted outerwear industry. The case is remanded to the District Court with instructions to return the matter to the Secretary for further proceedings as may be warranted. The restriction against industrial homework shall be reinstated and remain in effect unless properly modified pursuant to "reasoned decisionmaking" consistent with the opinion of this court.

So ordered.

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clined because of their inefficiency relative to factory workers. *Id.* at 10, II J.A. 612.

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2133

September Term, 19 83

Civil Action No. 81-02606

International Ladies' Garment Workers Union, et al.,
Appellants

v.

Raymond J. Donovan, et al.

United States Court of Appeals
for the District of Columbia Circuit
FILED NOV 29 1983
GEORGE A. FISHER
CLERK

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT and EDWARDS, Circuit Judges, and McGOWAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment ---------- of the District Court appealed from in this cause is hereby reversed and appellee Secretary's rescission of certain homework restrictions in the knitted outerwear industry is vacated. This case is remanded to the District Court with instructions to return the matter to the Secretary for further proceedings as may be warranted. All of the foregoing is in accordance with the opinion of this Court filed herein this date.

Per Curiam
For The Court
George A. Fisher
George A. Fisher
Clerk

Date: November 29, 1983
Opinion for the Court filed by Circuit Judge Edwards.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2133 September Term, 19

International Ladies' Garment Workers, Union, et al.
Appellants

v.

Raymond J. Donovan, et al.

Civil Action No. 81-02606

United States Court of ... of the District of Columbia

FILED FEB 1...

GEORGE A. F...
CLERK

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges and McGowan, Senior Circuit Judge

ORDER

The Suggestion for rehearing en banc of Appellee-intervenors, filed January 13, 1984, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

For The Court:

GEORGE A. FISHER, CLERK

By: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al.,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION NO. 81-2606
RAYMOND J. DONOVAN, Secretary of Labor, et al.,	)	
Defendants.	)	

MEMORANDUM

This case is brought pursuant to 5 U.S.C. §703 to review a regulation of the Secretary of Labor which removed the knitted outerwear industry from the list of industries in which industrial homework is prohibited by 29 C.F.R. §530 (1981). 46 Fed. Reg. 40,349 (October 9, 1981). The regulation allows the employment in the home of an undetermined

number of workers for whom such work was previously prohibited, provided the homeworker keeps extensive records. The new regulation overturns a 1942 prohibition against such homework, which the then Secretary had determined to be necessary "in order to carry out the purposes of the minimum wage order for the Knitted Outerwear Industry." Wage and Hour Division, In the Matter of Recommendation of Industry Committee No. 32 for a Minimum Wage Rate in the Knitted Outerwear Industry and Industrial Homework in the Knitted Outerwear Industry at 36 (Mar. 30, 1942) (hereinafter "1942 Findings").

I.

Plaintiffs are a labor union representing factory workers in the knitted outerwear industry, employers in

the same industry, and state officials charged with the enforcement of state statutes similar to the FLSA. They claim that the action of the Secretary is unlawful for a variety of procedural and substantive reasons, based upon their belief that as a result of the Secretary's action enforcement of the Fair Labor Standards Act in the industry will be significantly impaired. The Court granted motions for leave to intervene by intervenor-applicants who wish to perform work at home and to employ homeworkers within the relevant industry, and who join the government defendants in supporting the Secretary's action. All defendants contest plaintiffs' contention that allowing homework will impede enforcement of the Act, as well as plaintiffs' other

contentions. The government defendants also assert that plaintiffs lack standing to bring this challenge.

The knitted outerwear industry consists of those firms that knit from yarn, and, in the same establishment, further manufacture, dye or finish knitted garments for use as external apparel, and those firms that manufacture bathing suits from any purchased fabric. 29 C.F.R. §530.1(f) (1981), removed by 46 Fed. Reg. 40,349 (Oct. 9, 1981). There are approximately 63,000 persons employed in the industry throughout the United States. In 1942, with a few exceptions, not relevant here, all homework in this industry as well as six others was prohibited based on findings that minimum wage violations were widespread in industries in which homework

predominated, and that a prohibition of homework was accordingly necessary in order to prevent the circumvention or evasion of the minimum wage in those industries. This prohibition was upheld by the Supreme Court in Gemsco, Inc. v. Walling, 324 U.S. 244 (1945).

The Fair Labor Standards Act was amended in 1949, by, inter alia, adding a new section 11(d):

> The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

29 U.S.C. §211(d).

In 1980, partially in response to a controversy created when the prohibition of homework was enforced against a Vermont firm employing homeworkers, the Secretary published a notice of hearings in the Federal Register, addressed to the issue of whether "Regulations in 29 CFR Part 530 are still appropriate to safeguard the minimum wage prescribed in the Act and whether there is a need to change the Regulations to more accurately reflect the current status of industrial homework." 45 Fed. Reg. 80,555 (Dec. 5, 1980). After conducting hearings in Burlington, Vermont and Washington, D.C. the Agency proposed the elimination of the homework prohibition in all seven industries. 46 Fed. Reg. 25,108 (May 5, 1981). After receiving over 10,000 comments, the Agency removed the

prohibition in the knitted outerwear industry but left it intact in the remaining industries, based largely on the fact that the evidence indicated that substantial numbers of persons were prevented from working by the rule in the knitted outerwear industry, while no such demonstration was made with respect to the other six industries. The Preamble to the 1981 regulation stated that a concerted compliance effort would be undertaken in the knitted outerwear industry, and that the Department would consider reimposing the restriction should widespread violations of the Act occur, and might also consider removal of the restriction in the remaining industries should the evidence support such an action.

II.

The Secretary first maintains that plaintiffs lack standing to challenge his action here. This claim is based principally on his claim that plaintiffs have not show that they have or will suffer "injury in fact" from the decision to legalize homework in this industry. Plaintiffs argue on the contrary that without the restriction on homework they are likely to be subject to unfair competition from other employers paying below minimum wage to homeworkers whose wages the Department will be unable adequately to police. This could in turn result in unemployment of some of the union plaintiffs members who work in factories. Employer plaintiffs could lose markets or profits to the competition from firms employing

homeworkers at below minimum wage. Defendant claims that those injuries will not occur because in fact the Department will be able adequately to enforce the FLSA. However, this goes to the merits. The Court must assume, for purposes of deciding a motion to dismiss, that the allegations of the complaint are true and that plaintiffs will prevail on the merits of their claims that enforcement will be less effective to prevent below minimum wages than prohibition of homework has been. See, e.g. Gladstone Relators v. Village of Bellwood, 441 U.S. 91 (1979); United States v. SCRAP, 412 U.S. 669 (1973).

Of course, if the injuries alleged were a matter of pure speculation, plaintiffs could not create standing by means of a purely conclusory allegation.

However, the injuries alleged here are hardly speculative. The loss of jobs and profits to firms employing workers at subminimum wages was just the sort of injury against which Congress intended to guard by passing a national minimum wage law. Indeed, §2 of the Act, 29 U.S.C. §202, states that the existence of substandard labor conditions "constitutes an unfair method of competition in commerce." See also Lerwill v. Inflight Services, Inc., 379 F. Supp. 690, 696 (N.D. Cal. 1974), aff'd, 582 F. 2d 507 (9th Cir. 1978). Far from being speculative, then, the injuries alleged here are injuries which Congress sought to prevent by passing the Act.

This also makes clear that plaintiffs satisfy the "zone of interests" test of Association of Data

Processing Service Organization v. Camp, 397 U.S. 150 (1970). The fact that defendants may ultimately establish that the contention that increased violations will result from the removal of the homework restrictions is not proven does not affect plaintiffs' right to make that claim. If their claim is valid, there is a distinct likelihood that they will suffer the injuries they have alleged.

Defendants claim that plaintiffs might also suffer loss of jobs or profits due to other causes, such as the recession or foreign competition, is irrelevant. Plaintiffs do not have to show that defendants' conduct is the only source of injury to them, only that it is a source of injury. To give only one example, plaintiffs in Duke Power Co. v. Carolina Environmental Study Group, 438

U.S. 59 (1978) were not required to show that nuclear power plants were the sole source of the thermal poilution of which they complained, and indeed could not have made such a showing.

Defendants rely heavily on Warth v. Seldin, 422 U.S. 490 (1975). However, in that case, no plaintiff made allegations that, were the challenged zoning ordinances removed, he would be able to build or live in low-income housing. Here, plaintiffs have clearly alleged that they will suffer competitive harm of a type which the Act seeks to prevent. Thus, the industry and union plaintiffs have standing to bring this challenge. This makes it unnecessary to decide whether the state officials, who essentially allege impaired ability to enforce their own state laws, have

standing. Watt v. Energy Action Educational Foundation, 102 S. Ct. 205, 212 (1981).

III.

Turning now to the merits, plaintiffs first claim that §11(d), quoted above, removed any authority which the Secretary possessed to repeal the homework restrictions in the seven industries restricted at the time of its passage. The language of the statute does not support this construction, however, and plaintiffs have pointed to nothing in the legislative history which would indicate such an intent. Such evidence would have to be fairly strong and convincing before a court could conclude that Congress intended to freeze a regulation governing a method of enforcing the law, a matter normally

within the province of the Executive Branch. Here, the evidence is not merely weak, it is nonexistent. Plaintiffs' only real argument is that the "continued in full force and effect" language must have been intended to prevent repeal of the regulations at issue here, since otherwise it would be superfluous. They point to §16(c) of the same amendments, which provided generally for orders, regulations and interpretations under the prior act to remain in effect except as modified in the future or repealed. However, the legislative history of §11(d) makes clear that it was intended to resolve any doubts about the authority of the Secretary to regulate homework, as there was substantial doubt about the Secretary's authority to prohibit homework generally, as opposed to doing

so in specific industries. See Gemsco, Inc. v. Walling, supra, at 269. Section 11(d) makes clear that the restrictions on homework originally enacted as part of a wage-order regime continued to effect despite the fact that the wage orders themselves terminated. It also of course makes it clear that the Secretary has authority to restrict homework in other industries. The section is thus not superfluous if read to allow the repeal of prior homework regulations, and plaintiffs' argument must accordingly be rejected.

Plaintiffs' chief claim is that the removal of the homework restriction is arbitrary and capricious because the conclusion that the minimum wage can be enforced in the knitted outerwear industry is not supported by the record

and because the Agency failed to provide an adequate statement of the basis and purpose of the action, as required by 5 U.S.C. §553(c). These two arguments are inextricably linked, because the primary purpose of the "concise general statement" of the rule's basis and purpose is to facilitate review by enabling the reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." Automotive Parts & Accessories Ass'n. v. Boyd, 407 F. 2d 330, 338 (D.C. Cir. 1968). Here the Agency took very literally the requirement that the statement of basis and purpose be "concise." While a more complete discussion might have been preferable, the Preamble is sufficient to enable the

Court to make the necessary examination of the Agency's decision-making, particularly in view of the fact that much of the factual basis for the Agency's action necessarily involves judgment and prognostication, so that detailed factual findings are not feasible.

The parties are in agreement that the relevant standard of review is whether the Department's action here is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The parties are in apparent disagreement, however, on the actual amount of scrutiny and degree of deference owed to the agency under this standard on these facts. Plaintiffs point to the fact that regulation at issue here represents a

change from longstanding agency policy as justifying more exacting scrutiny, citing National Resources Defense Council v. SEC, 606 F. 2d 1031, 1049-50 n. 23 (D.C. Cir. 1979). On the other hand, defendants claim that the action here challenged is equivalent to inaction by the agency, to which there is normally extreme deference. Id. at 1052-53. Here, these two factors are roughly in equipoise and leave the standard of review much as it would be in the absence of either factor.

The D.C. Circuit seems to have reached a similar conclusion in the recent case of State Farm Mutual Automobile Ins. Co. v. Dep't of Transportation, No. 81-2220 (D.C. Cir. June 1, 1981), in which the standard of review for the recission of the passive

restraint regulation was held to be subject to the same standard of review as was the regulation's original promulgation. It is well settled that under the arbitrary and capricious standard of review courts are not permitted to weigh the evidence de novo or to substitute their judgment for that of the Agency, but rather must determine whether the decision was based on consideration of the relevant factors and was not the product of a clear error of judgment. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Weyerhaeuser Co. v. Costle, 590 F. 2d 1011, 1024-28 (1978). In this context, where informal rulemaking of a broad policymaking nature is being reviewed, this entails an examination of whether the Secretary has explained the facts and

policy concerns relied upon, whether the factual findings have some basis in the record, and whether they could lead a reasonable person to make the judgment the Secretary has made. Id. at 1027. This requires a reivew which is searching, careful and, in the end, deferential. Natural Resources Defense Council v. SEC, 606 F. 2d 1031 (D.C. Cir. 1979). The actual degree of scrutiny will frequently vary from case to case, depending upon the type of question presented, the intent of Congress, the expertise of the Secretary and the ability of the court to deal effectively with the particular type of question. Id. at 1050.

However, two additional factors not present in State Farm counsel here for particular deference to the Department.

First, the standard at issue in State Farm had been repeatedly and exhaustively examined for a number of years, and the decision to rescind the standard marked a sharp reversal of prior policy. While the reversal of prior policy challenged here is perhaps as sharp, the policy at issue here has not been the subject of repeated and thorough re-examination by either the Secretary or Congress; rather, it has remained unchallenged and unexamined since its original promulgation. While the fact that previous Secretaries have not seen fit to repeal the prohibition on homework is entitled to some weight, it is not the sort of continual scrutiny to which the passive restraint regulation was subjected.

More importantly for this case, the fact that the regulation here involves a decision as to how the Department can best enforce the minimum wage counsels extreme deference. Plaintiffs attack vigorously the Secretary's conclusion that "an effective enforcement program is feasible." 46 Fed. Reg. at 40,349. However, this sort of determination is within the special competence of the Executive Branch; a Court should set aside such a finding only if there is virtually no evidence or reason to support it.

The Agency's determination that conditions have changed sufficiently in the forty years since the homework prohibition was first promulgated to now permit an adequate enforcement effort is based on several factors. First, the

Department found that when the rule was first promulgated the minimum wage was fairly new, and that acceptance of the minimum wage is now greater than it was then. While plaintiffs attack this finding, it is supported by common sense, by the Secretary's expertise, and by the testimony of workers in the knitted outerwear industry. Plaintiffs attack this testimony because the witnesses kept no records of the number of hours they worked. But this attack bears on the probative value of the testimony, an issue which can best be resolved by those who observed the witnesses, i.e., the Secretary and not this Court.

In addition, the Secretary noted that at the time the rule banning homework was promulgated homeworkers constituted over 20 percent of the

workforce. The Secretary found that homeworkers were likely to constitute a small percentage of the workforce if homework were legalized now. Plaintiffs maintain that this finding is not supported by a survey or study. However, the Agency could reasonably conclude that such a survey was not indicated, since such employment is now illegal and any projection about the future is necessarily speculative. In any event, the finding that homeworkers are likely to constitute a smaller percentage of the workforce now than in 1942 is consistent with the findings of the then Administrator that factory production was more efficient than home production and that the prohibition of homework would therefore likely lead to improved production methods. See 1942 Findings at

36. If this is true, it is unlikely that many would wish to return to a less efficient method of production. Finally, both the Secretary's own 1959 Study and a study drafted by the Illinois Department of Labor and submitted to the Secretary support a finding that the incidence of violations in the knitted outerwear industry is unlikely to be so high as to preclude an effective enforcement program.

The evidence on the other side consisted primarily of conclusory statements that enforcement of the minimum wage laws was impossible where homework existed, together with a repetition of the 1942 Findings. The agency could properly reject such claims as unsubstantiated or counterbalanced by contrary evidence and inferences. The

Agency could also properly conclude that the comments of many of those commenting were entitled to relatively less weight because they were made by persons who would be competing with homeworkers or employers of homeworkers, and who might desire to prevent such competition even at wages in excess of the minimum.

Finally, the government relied in making its determination that an effective enforcement program was feasible on data which indicate that violations occur as frequently in industries in which homework is prohibited as in other industries. See Plaintiffs' Appendix E. In all industries save the seven in 29 C.F.R. §530, homework is permitted, yet (the Secretary might conclude) an effective enforcement program is feasible. There

was no showing that the problem of homework in this industry was particularly intractable or that any other distinction aside from historical accident now necessitated treating the knitted outerwear industry differently from the hundreds of other industries in which homework is permitted.

Defendant's decision to remove the homework restriction, and in particular its decision to do so in this industry while retaining it in the other six, was also based on a finding that allowing homework in this industry would prevent a "substantial curtailment of earning power." 46 Fed. Reg. at 50,349. This was based on substantial testimony that the prohibition of homework precluded many persons in rural areas otherwise able to work from any work opportunity at

all because there were no factories accessible to them. This stands in marked contrast to the situation in 1942, when the Administrator found that most of the homeworkers lived in urban areas in close proximity to the factory. 1942 Findings at 19, 36. Plaintiffs claim that this gain in jobs may well be offset by a loss in factory jobs. But it is also possible that a net gain in jobs, either due to cost savings or to sales by employers of homeworkers that were formerly lost to foreign competition, could be realized. In any event, the Secretary could properly conclude that in the context of real persons for whom the restriction was a definite hardship, the option of working at home should be afforded as long as it would not significantly impair enforcement of the

Act.

Plaintiffs assume that the statute requires the Secretary to prohibit homework unless he finds that allowing it will not result in minimum wage violations. The statute is not so worded, however. It authorizes the Secretary to regulate, restrict or prohibit homework to the extent necessary or appropriate to prevent circumvention or evasion of the minimum wage. But the statute requires consideration of the effect of such a regulation on earning power. See 29 U.S.C. §202. Obviously, the outlawing of all homework would reduce by some amount violations of the minimum wage, but at the cost of preventing some persons from working who might work otherwise. The Secretary could reasonably conclude that the total

prohibition of a type of work simply because some who work that way will not be paid minimum wage is a draconian remedy and not to be employed lightly.

Thus, one of the cases on which plaintiffs chiefly rely, Defenders of Wildlife v. Endangered Species Scientific Auth., 659 F. 2d 168 (D.C. Cir. 1981), is readily distinguishable. There the Court of Appeals reversed an agency determination that the requirements of a treaty that no export of animals be made unless a finding of no detriment to the survival of the species (in this case bobcats) was made. In that case, the Court held that no finding of no detriment could be made where there was no information on the total number of bobcats nor on the total number killed. Apart from the fact that the factual

basis for the government's finding here is more substantial, there is a great difference between the requirements of the treaty at issue in Defenders of Wildlife and this statute. The treaty at issue here required the prohibition of exports unless a finding of no detriment could be made, thus implying that in doubtful cases the prohibition should stand. Plaintiffs' theory in this case would have more merit if the statute here required the Secretary to prohibit homework unless he found that there would be no significant violations of the minimum wage. The statute does not set up such a presumption of illegality; rather, it provides an additional tool for the Department to use in its enforcement of the Act.

In six industries there was insufficient evidence to lead the Secretary to conclude that the jobs lost outweighed the gains in enforcement of the FLSA. In the knitted outerwear industry, however, there was substantial evidence of hardship, together with evidence that enforcement without the prohibition was feasible. It was within the discretion of the Secretary to determine that, in the knitted outerwear industry, as in the majority of other industries, the balance of considerations dictated that the prohibition be lifted. This is particularly so because the prohibition could remain in place in the other six, allowing the Department to concentrate an enforcement program on the knitted outerwear industry in an effort to insure that compliance with the Act

was not lessened.

Many of plaintiffs' objections result from the lack of factual data about the modern incidence of homework violations in the restricted industries. Plaintiffs maintain that defendant should have conducted studies to determine what the effects would be. In many ways, however, that is just what defendant is doing in this industry. By removing the prohibition in one industry while retaining it in six, defendant is able to conduct an experiment to determine the extent to which the prohibition on homework in the other industries is still necessary. If an acceptable level of violations results, the Secretary may conclude that the removal of the prohibitions in other industries is in order. On the other hand, if an

unacceptable number of violations result, then he may reimpose the ban on homework. The courts should be extremely reluctant to interdict such an experiment, which may well be the only way to determine empirically whether the forty year old prohibition is needed to enforce the minimum wage law. We should be particularly reluctant to do so on grounds that information is sparse. See United Telegraph Workers, AFL-CIO v. Federal Communications Commission, 436 F. 2d 920 (D.C. Cir. 1970).

Plaintiffs' remaining objections may be dealt with briefly. They claim that it was arbitrary and capricious to refuse to consider the effect that removal of the prohibition would have on child labor, despite the fact that there was no real evidence of such a problem than

conclusory allegations by opponents of the standard. Moreover, the issue of feasibility of enforcement of child labor laws is not readily distinguishable from that of minimum wage laws.

Plaintiffs claim that the Notice of Proposed Rulemaking did not give notice that the Department was relying on §2 of the FLSA, 29 U.S.C. §202, as well as on §11(d). However, the Department was not promulgating the rule under Section 2. Section 2 is the Preamble to the statute and states its basic purposes and aims. It is obvious that any agency, in promulgating rules under a specific section of a statute, must consider the statute as a whole and in particular consider the purposes underlying the statute as found by Congress.

Plaintiffs also claim that they did not receive adequate notice that curtailment of employment opportunities would be considered as a factor in the rulemaking. However, apart from the fact that it should be obvious that any proposal to remove homework restrictions would consider the jobs that would be thus made possible, the Notice specifically invited comments on the impact of the proposal on the restricted industries. 46 Fed Reg. at 25,109. This obviously includes employment opportunities within the industry. Finally, both the initial hearings and the comments submitted focused heavily on the hardship experienced by Vermont knitters. The plaintiffs here submitted copious comments of this issue, and can hardly be heard to complain now that they

were suprised when the Department considered this obviously relevant factor.

Plaintiffs' challenges to the removal of the prohibition on homework must therefore be rejected. an accompanying Order accordingly denies plaintiffs' Motion for Summary Judgment and grants the defendants' Motion for Summary Judgment.

Date:

/s/
Judge Oberdorfer
United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al., Plaintiffs v. RAYMOND J. DONOVAN, Secretary of Labor, et al., Defendants.	CIVIL ACTION NO. 81-2606

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(Review of Agency Action)

COUNT ONE

1. This is an action to declare unlawful and to enjoin implmentation of a final rule promulgated by the United States Department of Labor on October 9, 1981, which will by its terms become effective on November 9, 1981 (hereinafter "Final Rule"). The action

arises under the Fair Labor Standards Act ("FLSA"), as amended, 29 U.S.C. §201 et seq.; under §10 of the Administrative Procedure Act ("APA"), 5 U.S.C. §701-706; and the Declaratory Judgments Act, 28 U.S.C. §2201 et seq.

2. The jurisdiction of this Court is founded on 28 U.S.C. §1331 and 1337.

3. Venue lies in this Court under 28 U.S.C. §1391(e).

4. Plaintiff International Ladies' Garment Workers' Union ("ILG") is a labor organization headquartered in New York, New York, with approximately 325,000 members who are employed by firms engaged in the women's and children's apparel industries, producing and distributing women's and children's apparel and related products. Of these, more than 12,000 members are employed in that

portion of the apparel industry defined in 29 C.F.R. §530.1(f) as the "knitted outerwear industry." ILG's objectives include the improvement of the terms and conditions of employment and general welfare of workers engaged in the women's and children's apparel industries by organizing unorganized workers, negotiating collective bargaining agreements, and adjusting and settling grievances against employers, through lawful means. ILG brings this lawsuit on behalf of itself and as representative of its members.

5. Plaintiff Donald Vial ("Vial") is the Director of the Department of Industrial Relations of the State of California, a duly formed department of the state government of California headquartered in San Francisco and

charged with responsibility for fostering, promoting, and developing the welfare of the wage earners of California, improving their working conditions, and advancing their opportunities for profitable employment. Vial brings this lawsuit pursuant to his authority to perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes vested by law in the Department, including but not limited to the enforcement of California's industrial homework law, California Labor Code §2650 et seq.

6. Plaintiff Patrick W. Henning ("Henning") is the Labor Commissioner of the State of California and ex-officio Chief of the Division of Labor Standards Enforcement of the Department of

Industrial Relations. Henning brings this lawsuit pursuant to his authority to enforce the provisions of California's industrial homework law and implementing regulations, California Administrative Code, Title 8, §11008 et seq., including Article 2, §11020-11024, which prohibits industrial homework in the garment manufacturing industry.

7. Plaintiff Lillian Roberts ("Roberts"), Industrial Commissioner of the State of New York, is the head of the New York State Department of Labor, headquartered in Albany. In this capacity she is charged with enforcement of the New York Labor Law, including Article 13 (§350-363) which regulates and restricts the employment of industrial homeworkers in the State. Section 350(1) sets forth the findings of the

Legislature of the State of New York concerning industrial homework:

> "The employment of women and minors in industry in the state of New York under conditions resulting in wages unreasonably low and conditions injurious to their health and general welfare is a matter of grave and vital public concern. Any conditions of employment especially fostering such working conditions are therefore destructive of purposes already accepted as sound public policy by the legislature of the state and should be brought into conformity with that policy. Uncontrolled continuance of homework is such a condition; here wages are notoriously lower and working conditions endanger the health of the worker; the protection of factory industries, which must operate in competition therewith and of the women and minors employed therein and of the public interest of the community at large in their health and well-being, require strict control and gradual

> elimination of industrial homework."

In conformity with these findings, §351 authorizes the Commissioner to regulate industrial homework in the State; and, pursuant to this authority, the employment of homeworkers in the knitted outerwear industry has been restricted in New York. Roberts bring this lawsuit pursuant to §21 of the New York Labor Law to enforce the provisions of Article 13 of that law and pursuant to §21-c of that law to procure for the people of New York all of the benefits and assitance provided by the FLSA.

8. Plaintiff Amalgamated Clothing and Textile Workers Union, AFL-CIO, ("Amalgamated") is a labor organization headquartered in New York, New York, with approximately 455,000 members, a

significant number of whom are employed by firms engaged in the manufacture of apparel that competes directly with knitted outerwear products. Amalgamated's objectives include the improvement of the terms and conditions of employment and general welfare of workers engaged in apparel industries by organizing unorganized workers, negotiating collective bargaining agreements, and adjusting and settling grievances against employees, through lawful means. Amalgamated brings this lawsuit on behalf of itself and as representative of its members.

9. Plaintiff Dalton Industries, Inc., ("Dalton") is a corporation headquartered in Willoughby, Ohio, and engaged in the manufacture of knitted outerwear and other apparel products that

compete directly with knitted outerwear. Dalton employs approximately 1,200 employees in plants in Willoughby, Lorain, Canton, and Solon, Ohio, and in Asheville and Columbus, North Carolina.

10. Plaintiff Knitgoods Workers' Union, Local 155, I.L.G.W.U., ("Local 155") is a labor organization headquartered in New York, New York, with approximately 6400 members who are employed primarily by firms engaged in the manufacture of knitted outerwear in New York and New Jersey. Local 155 brings this lawsuit on behalf of itself and as representative of its members.

11. Plaintiff Knitgoods Workers' Union, Local 190, I.L.G.W.U., ("Local 190") is a labor organization headquartered in Philadelphia, Pennsylvania, with approximately 4600

members who are employed primarily by firms engaged in the manufacture of knitted outerwear in Pennsylvania and New Jersey. Local 190 brings this lawsuit on behalf of itself and as representative of its members.

12. Plaintiff Knitted Outerwear Manufacturers Association, Pennsylvania District, (KOMA") is an unincorporated business league headquartered in Philadelphia, Pennsylvania. KOMA consiss of 28 member firms engaged in the production of knitted outerwear products in southeastern Pennsylvania and in that portion of New Jersey which is within the Philadelphia metropolitan area. KOMA's objectives include promoting the business interests of its members, including the reform of abuses with respect to the production, manufacture, distribution and

sale of knitted outerwear products.

13. Plaintiff Myer Manufacturing, Inc., ("Myer") is a corporation headquartered in Philadelphia, Pennsylvania, and engaged as a contractor in the production of knitted outerwear, including women's and children's bathing suits and related garments. Myer employs approximately 138 persons to manufacture and sell these garments.

14. Plaintiff United Knitwear Manufacturers Legaue, Inc., ("United") is an association headquartered in New York, New York, of approximately 50 firms that manufacture knitted outerwear products in the New York City metropolitan area. United's objectives include promoting the business interests of its members, including the reform of abuses with respect to the production, manufacture,

distribution and sale of knitted outerwear products. United brings this lawsuit on behalf of itself and as representative of its members.

15. Defendant Raymond J. Donovan, Secretary of the United States Department of Labor, has the ultimate authority, pursuant to §11 of the FLSA, 29 U.S.C. §211, for enforcing the provisions of the FLSA and for promulgating regulations to safeguard the minimum wage rate.

16. Defendant William M. Otter, Administrator of the Wage and Hour Division, is head of the division within the Department of Labor which is responsible for implementing the provisions of the FLSA and regulations promulgated pursuant thereto establishing and preventing circumvention of the minimum wage rate. In his capacity as

Administrator of this Division, defendant Otter signed the Final Rule which is challenged herein.

17. The Final Rule, which is published at 46 Fed. Reg. 50349 (Oct. 9, 1981), provides for the removal of 29 C.F.R. §530.1(f) and amends additional sections of 29 C.F.R. Part 530 to conform with this removal. Section 530.1(f) defines the term "knitted outerwear industry" and establishes that industry as one covered by the homework restriction codified at 29 C.F.R. §530.2. A copy of the Final Rule and its Preamble are attached hereto as Exhibit A and are incorporated by reference herein.

18. Part 530 of Title 29 of the Code of Federal Regulations, since its promulgation in the early 1940's, has restricted the employment of individuals

to perform industrial work in their homes, apartments, tenements and other residential establishments in seven "industries," six of which are apparel industries. In addition to knitted outerwear, these apparel industries are denominated in 29 C.F.R. §530.1 as: women's apparel, embroideries, button and buckle manufacturing, handkerchief manufacturing, and gloves and mittens. The seventh restricted industry -- jewelry manufacturing -- is not an apparel industry.

19. As used in 29 C.F.R. Part 530, industrial homework means "the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source...of

the materials used by the homeworker in such production." 29 C.F.R. §530.1(c).

20. Between 1941 and 1943, the Administration of the Wage and Hour Division promulgated restrictions on homework in the six apparel industries and the jewelry industry pursuant to his authority under the FLSA to issue orders containing "such terms and conditions as the Administrator finds necessary...to prevent the circumvention or evasion [of the Administrator's orders], and to safeguard the minimum wage rates established therein." FLSA §8(f), 52 Stat. 1065.

21. The restriction of industrial homework in the knitted outerwear industry was issued on March 30, 1942, after extensive administrative hearings led the Administrator to conclude that:

> "it is necessary, in order to carry out the purposes of the minimum wage order for the Knitted Outerwear Industry, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Knitted Outerwear Industry shall be done in or about a home..., except by such persons as have obtained special home work certificates...." Wage and Hour Division, In the Matter of...Minimum Wage Rate...and Industrial Homework in the Knitted Outerwear Industry, Findings and Opinion of the Administrator, at 36 (Mar. 30, 1942).

22. The Fair Labor Standards Amendments Act of 1949 ("1949 Amendments") provided that "all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full

force and effect." 63 Stat. 917, 29 U.S.C. §211(d). In addition, the 1949 Amendments provided express authority for further regulations restricting industrial homework. This Act added §11(d) to the FLSA, which declared that

> "The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act...." 63 Stat. 916-17, 29 U.S.C. §211(d).

23. The restriction on industrial homework in the knitted outerwear industry has remained unchanged and in full force and effect continuously since its initial promulgation in 1942.

24. On December 5, 1980, the Wage and Hour Division of the Department of

Labor published in the Federal Register a notice of hearing "for the purpose of obtaining information concerning employment of homeworkers." 45 Fed. Reg. 80555. In this notice the Division stated that it intended to conduct hearings in Burlington, Vermont, and Washington, D.C., to determine if the industrial homework regulations contained at 29 C.F.R. Part 530 "are still appropriate to safeguard the minimum wage rate prescribed in the [Fair Labor Standards] Act and whether there is a need to change the Regulations to more adequately reflect the current status of industrial homework." 45 Fed. Reg. 80555.

25. Pursuant to the notice of December 5, 1980, hearings were conducted in Vermont on January 13-14, 1981, and in

Washington, D.C., on February 17-18, 1981. In the course of these hearings, ILG and other plaintiffs provided oral and written testimony that demonstrated the continued need nationwide to maintain the existing restrictions on industrial homework in all six apparel industries. Proponents of changing or eliminating the homework restrictions confined almost all their testimony to the situation involving the production of sweaters, hats and scarves by home knitters in the rural areas of one State -- Vermont.

26. Thereafter, on May 5, 1981, the defendant Secretary published a notice of proposed rulemaking proposing the elimination of the restriction on homework throughout the United States in all seven regulated industries. 46 Fed. Reg. 25108. The notice stated that

"[a]fter careful consideration of the oral testimony and written comments received as a result of the hearings, as well as the information the Department has obtained independently, it is proposed that Regulations 29 C.F.R. Part 530 be removed." 46 Fed. Reg. 25108. The sole item of "independently obtained" information relied upon by the defendant Secretary was a single-page document entitled "Summary of Wage and Hour Division Investigations of Employers Utilizing Homeworkers by Restricted and Nonrestricted Industries."

27. In response to the notice of proposed rulemaking, ILG and other plaintiffs submitted comments demonstrating the need for continuation of the existing homework regulations in the six regulated apparel industries.

28. The Final Rule will eliminate in its entirety the restriction on industrial homework in rural and urban areas throughout the United States in the part of the apparel industry known as the knitted outerwear industry.

29. In the Preamble to the Final Rule, published at 46 Fed. Reg. 50348 (Oct. 9, 1981), defendants made no finding or explanation of the effect that the Final Rule will have on enforcement of the mnimum wage in the knitted outerwear industry. The Notice states that "substantial curtailment of employment opportunities and earning power will result from a continuation of the [existing] restrictions on industrial homework in the knitted outerwear industry." 46 Fed. Reg. at 50349.

30. As defined by 29 C.F.R. §530.1(f), the knitted outerwear industry consists -- with certain enumerated exceptions -- of those firms that knit from yarn and, in the same establishment, further manufacture, dye, or finish knitted garments for use as external apparel and those firms that manufacture bathing suits from any puchased fabric. Included among the garments manufactured by the knitted outerwear industry are sportswear, suits, skirts, pants, shorts, dresses and bathing suits.

31. Firms within that portion of the apparel industry known as the knitted outerwear industry and covered by 29 C.F.R. §530.1(f) are located throughout the United States and, as of 1980, employed approximately 80,000 workers. In 1977, the total dollar volume of

production in the knitted outerwear industry amounted to approximately $1.9 billion.

32. The Final Rule eliminating the present restriction on homework in the knitted outerwear industry will result in the employment in urban and rural areas throughout the nation of substantial numbers of homeworkers at wages below the statutory minimum and in violation of the maximum hours and child labor provisions of the FLSA.

33. Firms paying less than the minimum wage to homeworkers will have an illegal competitive advantage over firms, in the knitted outerwear industry and in other directly competitive portions of the apparel industry, that comply with the minimum wage requirement. This will cause existing firms manufacturing

knitted outerwear, including plaintiffs Dalton and Myer and members of plaintiffs United and KOMA, as well as firms manufacturing other apparel that competes directly with knitted outerwear, to lose business volume and customers and force some firms to go out of business. As a direct result of the Final Rule, therefore, members of plaintiffs ILG, Locals 155 and 190, and Amalgamated will be irreparably injured by a loss of work and jobs and by reductions in their wages and other terms and conditions of employment.

34. The Final Rule, by causing a loss of work and jobs and by adversely affecting the terms and conditions of employment established over many decades of collective bargaining, will injury plaintiffs ILG, Locals 155 and 190, and

Amalgamated themselves. Their memberships will decline and their ability to organize presently unorganized workers and to improve the terms and conditions of employment for their members will be adversely affected.

35. The Final Rule, by causing existing firms manufacturing knitted outerwear to lose business volume and customers and by forcing some out of business, will injury plaintiffs United and KOMA themselves. Their memberships and income from their members will decline and their ability to promote the business interests of their members, including the reform of abuses with respect to the production, manufacture, distribution, and sale of knitted outerwear products, will be adversely affected.

36. The Final Rule will impair the ability of the people of California and New York to receive the benefits and assistance provided by the FLSA. The Final Rule will also

(a) inhibit the ability of plaintiffs Vial, Henning, and Roberts to perform their statutory obligations respecting industrial homework by reducing federal cooperation and financial assistance in the enforcement of the minimum wage, maximum hour, and child labor provisions of the FLSA; and

(b) enable firms manufacturing knitted outerwear in states other than California and New York to obtain an illegal competitive advantage over California and New York firms manufacturing knitted

outerwear and apparel that competes directly with knitted outerwear by employing homeworkers in violation of the minimum wage provisions of the FLSA. As a result, California and New York will lose business and revenues, and their citizens will suffer diminished employment opportunities and earning power, all to the detriment of the economy and general welfare of California and New York.

37. Retention of 29 C.F.R. §530.1(f) restricting industrial homework in the knitted outerwear industry is necessary to enforce the statutory minimum wage in the knitted outerwear industry.

38. The Final Rule contravenes §11(d) of the FLSA, 29 U.S.C. §211(d),

which continues the existing homework regulations "in full force and effect." Removal of any of the existing homework regulations can only be accomplished by an act of Congress, and therefore defendants' promulgation of the Final Rule was contrary to and in excess of their statutory authority. 5 U.S.C. §706(2)(A).

39. Defendants' reliance on the effect of the existing industrial homework restrictions in the knitted outerwear industry on "employment opportunities and earning power" as a ground for removal of the homework restriction exceeds the scope of defendants' rulemaking authority under §11(d) of the FLSA. 29 U.S.C. §211(d).

40. Defendants' removal of a regulation that remains "necessary or

appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate," 29 U.S.C. §211(d), exceeds the scope of defendants' rulemaking authority under the FLSA.

COUNT TWO

41. Plaintiffs adopt herein by reference each of the allegations contained in paragraphs 1 through 40 of this amended complaint.

42. The APA requires agencies engaging in rulemaking to publish an adequate notice of proposed rulemaking in order to afford interested persons an opportunity to participate in the rulemaking through the submission of data, views, and arguments. The notice of proposed rulemaking issued by defendants on May 5, 1981, was inadequate in that it failed (a) to refer to section

2 of the FLSA, 29 U.S.C. §202, as a legal authority under which the rule was being proposed; (b) to indicate that defendants intended to base their decision concerning removal of the homework regulations on whether or not the existing regulations substantially curtailed employment or earning power; and (c) to indicate that defendants were considering the necessity and appropriateness of the existing regulations on an industry-by-industry basis.

43. The Preamble to the Final Rule states:

> "Specific support for removal of the restrictions in knitted outerwear [sic] was presented in more than 1,500 comments received. While some 6,000 comments were received opposing the proposl to remove the restrictions on industrial

> homework in general, very few specifically addressed knitted outerwear." 46 Fed. Reg. 50349.

44. Any absence of comments specifically opposing removal of the homework regulations in the knitted outerwear industry was the result of defendants' failure to provide adequate notice to interested parties that defendants were considering the necessity and appropriateness of the existing homework restrictions on an industry-by-industry basis.

45. Defendants' failure to refer in the notice of proposed rulemaking to section 2 of the FLSA, 29 U.S.C. §202, as a legal authority under which the rule was being proposed violated the express notice requirement of §4(a)(2) of the APA, 5 U.S.C. §553(b)(2).

46. Defendants' failure to provide adequate notice to interested parties that defendants intended to base their decision regarding removal of the homework regulations on whether or not the existing regulations substantially curtailed employment or earning power denied plaintiffs and other interested parties an adequate opportunity to comment on a significant part of defendants' decisionmaking process and thus violated the requirements of §§4(a)(3) and (b) of the APA, 5 U.S.C. §§553(b)(3), (c).

47. Defendants' failure to provide adequate notice to interested parties that defendants were considering removal of the existing homework restrictions on an industry-by-industry basis denied plaintiffs and other interested parties

an adequate opportunity to comment on a significant part of defendants' decisionmaking process and thus violated the requirements of §4(a)(3) and (b) of the APA, 5 U.S.C. §553(b)(3), (c).

COUNT THREE

48. Plaintiffs adopt herein by reference each of the allegations contained in paragraphs 1 through 47 of this amended complaint.

49. Prior to promulgation of the Final Rule, defendants undertook no empirical or objective assessment of the consequences respecting enforcement of the minimum wage of the proposed nationwide removal of the restriction on homework in the knitted outerwear industry. Defendants also undertook no empirical or objective assessment of the effect of the existing restriction on

homework in the knitted outerwear industry or its removal on employment opportunities and earning power.

50. In promulgating the Final Rule, defendants failed to afford plaintiffs and other interested persons an adequate opportunity to test and criticize the factual basis for the Rule.

51. The record upon which defendants relied in promulgating the Final rule fails to support the removal of 29 C.F.R. §530.1(f) in that the record (a) establishes that continuation of this restriction on homework in the knitted outerwear industry is necessary and appropriate to safeguard the minimum wage in urban and rural areas throughout the United States; (b) establishes that there has been no material change in economic circumstances in the knitted outerwear

industry since this homework restriction was initially promulgated; (c) raises no serious questions as to the necessity or appropriateness of this restriction to safeguard the minimum wage in the knitted outerwear industry in urban and rural areas throughout the United States; (d) fails to contain substantial evidence that even the home knitters of rural Vermont are in fact being paid the minimum wage; (e) contains no evidence that continuation of this restriction will substantially curtail employment opportunities and earning power in the knitted outerwear industry; (f) contains no evidence that the Final Rule will result in an overall increase in either employment opportunities or earning power; and (g) contains no evidence that an effective program of enforcing the

minimum wage in the knitted outerwear industry will be feasible if homework is permitted.

52. The Preamble to the Final Rule fails to rebut or attempt to answer the substantial evidence presented by plaintiffs and other commenters opposing removal of the existing homework restrictions, and defendants have therefore failed to provide an adequate "general statement of...basis and purpose" as required by §4(b) of the APA, 5 U.S.C. §553(c).

53. Defendants' reliance on the quantity of comments specifically addressing the knitted outerwear industry, as described in paragraphs 43 and 44 of this amended complaint, was arbitrary and capricious, particularly in view of the failure of the notice of

proposed rulemaking to inform interested parties that defendants were considering the necessity and appropriateness of the existing regulations on an industry-by-industry basis.

54. Defendants' removal of 29 C.F.R. §530.1(f) is unlawful under §10 of the APA, 5 U.S.C. §701-706, in that (a) the record fails to contain substantial evidence supporting the action, and (b) the action is arbitrary and capricious and otherwise violative of the substantive and procedural requirements of the APA and the FLSA.

WHEREFORE, plaintiffs pray that this Court grant judgment as follows:

A. Declaring the Final Rule unlawful and void in that:

(1) defendants' promulgation of the Final Rule is in excess of statutory authority

and contravenes §11(d) of the FLSA, 29 U.S.C. §211(d);

(2) defendants failed to provide adequate notice, as required by §4(a) and (b) of the APA;

(3) defendants' action is not accompanied by an adequate "general statement of...basis and purpose," thereby violating §4(b) of the APA; and

(4) defendants' action is not supported by substantial evidence in the record and is arbitrary and capricious and otherwise violative of the APA and the FLSA;

B. Enjoining defendants from implementing the Final Rule removing the restriction on homework in the knitted outerwear industry; and

C. Granting plaintiffs their costs and reasonable attorneys' fees and such other and further relief as may be just and equitable.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al.,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION NO. 81-2606
RAYMOND J. DONOVAN, Secretary of Labor, et al.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and Rule 1-9(h) of the Rules of this Court, plaintiffs hereby move this Court for summary judgment enjoining defendants Raymond J. Donovan, Secretary of the United States Department of Labor, and William M. Otter, Administrator of the Department's Wage and Hour Division, from

further implementing the Final Rule promulgated on October 9, 1981 (46 Fed. Reg. 50349), which removed the restriction on homework in the knitted outerwear industry, and declaring that the Final Rule is unlawful and void in that:

1. defendants acted without statutory authority and in violation of the Fair Labor Standards Act in promulgating the Final Rule;

2. the Final Rule is arbitrary and capricious and is not accompanied by an adequate statement of basis and purpose; and

3. defendants failed to provide adequate notice of the Final Rule.

There are no material facts in dispute and, for the reasons set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiff's

Motion for Summary Judgment, plaintiffs are entitled to judgment as a matter of law.

Plaintiffs request oral argument on this motion.

Respectfully submitted,

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EDITOR'S NOTE

PAGES 146 through 174 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PART 530—EMPLOYMENT OF HOMEWORKERS IN CERTAIN INDUSTRIES

Sec.
530.1 Definitions.
530.2 Restriction of homework.
530.3 Application on official forms.
530.4 Terms and conditions for the issuance of certificates.
530.5 Investigation.
530.6 Termination of certificates.
530.7 Revocation and cancellation.
530.8 Preservation of certificates.
530.9 Records and reports.
530.10 Delegation of authority to grant, deny, or cancel a certificate.
530.11 Petition for review.
530.12 Special provisions.
530.13 Petition for amendment of regulations.

AUTHORITY: Sec. 11, 52 Stat. 1066; 29 U.S.C. 211, unless otherwise noted.

SOURCE: 24 FR 729, Feb. 3, 1959, unless otherwise noted.

§ 530.1 Definitions.

(a) The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production," as used in this part, is the same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Industrial homeworker" and "homeworker," as used in this part, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(c) "Industrial homework," as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

(d) The women's apparel industry is defined as follows: The production of women's, misses' and juniors' dresses,

washable service garments, blouses, and neckwear from woven or purchased knit fabric; women's, misses', children's and infants' underwear, nightwear, and negligees from woven fabrics; corsets and other body supporting garments from any material; other garments similar to the foregoing; and infants; and children's outerwear.

(e) The jewelry manufacturing industry is defined as follows:

(1) (i) The manufacturing, processing, or assembling, wholly or partially from any material, of jewelry, commonly or commercially so known. Jewelry as used herein includes without limitation, religious, school, college, and fraternal insignia; articles of ornament or adornment designed to be worn on apparel or carried on or about the person, including, without limitation, cigar and cigarette cases, holders, and lighters; watch cases; metal mesh bags and metal watch bracelets; and chain, mesh, and parts for use in the manufacture of any of the articles included in this definition. Jewelry as used in this part does not include pocket knives, cigar cutters, badges, emblems, military and naval insignia, belt buckles, and handbag and pocketbook frames and clasps, or commercial compacts and vanity cases, except when made from or embellished with precious metals or precious, semiprecious, synthetic or imitation stones, or the assaying, refining, and smelting of base or precious metals.

(ii) The term "parts" as used in subdivision (i) of this subparagraph does not include parts which are used predominantly for products other than jewelry, such as springs, blades, and nail files. The term "commercial compacts and vanity cases" as used means compacts and vanity cases which bear the trade name or mark of a cosmetic manufacturer and are made for the purpose of distributing or advertising

said cosmetics.

(2) The manufacturing, cutting, polishing, encrusting, engraving, and setting of precious, semiprecious, synthetic, and imitation stones.

(3) The manufacturing, drilling, and stringing of pearls, imitation pearls, and beads designed for use in the manufacture of jewelry.

(4) The term "hand-fashioned jewelry" as used in § 530.12(b) means articles of jewelry commonly known as genuine Navajo, Pueblo, Hopi, or Zuni handmade jewelry which in all elements of design, fashioning and ornamentation are handmade by methods and with the help of only such devices as permit the maker to determine the shape and design of each individual product: *Provided*, That silver used in the making of such jewelry shall be of at least nine hundred fineness, and that turquoise and other stones used shall be genuine stones, uncolored and untreated by artificial means: *And provided further*, That power machinery is permitted in the production of findings, in the cutting and polishing of stones, in the buffing and polishing of completed products, and in incidental functions. Equipment specifically prohibited shall include hand presses, foot presses, drop hammers, and similar equipment: *And provided further*, That solder may be of less silver content than nine hundred; *And provided further*, That findings may be mechanically made of any metal by Indians or others: *And provided further*, That turquoise and other stones may be cut and polished by Indians or others without restrictions as to methods or equipment used.

(f) The knitted outerwear industry is defined as follows: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as exter-

nal apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric: *Provided*, That the manufacturing, dyeing or other finishing of the following shall not be included:

(1) Knitted fabric, as distinguished from garment sections or garments, for sale as such.

(2) Fulled suitings, coatings, topcoatings, and overcoatings.

(3) Garments or garment accessories made from purchased fabric, except bathing suits.

(4) Gloves or mittens.

(5) Hosiery.

(6) Knitted garments or garment accessories for use as underwear, sleeping wear, or negligees.

(7) Fleece-lined garments made from knitted fabric containing cotton only or containing any mixture of cotton and not more than 25 percent, by weight, of wool or animal fiber other than silk.

(8) Knitted shirts of cotton or any synthetic fiber or any mixture of such fibers which have been knit on machinery of 10-cut or fine: *Provided*, That this exception shall not be construed to exclude from the knitted outerwear industry and the manufacturing, dyeing, or other finishing of knitted shirts made in the same establishment as that where the knitting process is performed, if such shirts are made wholly or in part of fibers other than those specified in this clause, or if such shirts of any fiber are knit on machinery coarser than 10-cut.

(g) The gloves and mittens industry is defined as follows: The production of gloves and mittens from any material or combination of materials, except athletic gloves and mittens.

(h) The button and buckle manufacturing industry is defined as follows:

The manufacture of buttons, buckles, and slides, and the manufacture of blanks and parts for such articles from any material except metal, for use on apparel.

(i) The handkerchief manufacturing industry is defined as follows: The manufacture of men's, women's and children's handkerchiefs, plain or ornamented, from any materials.

(j) The embroideries industry is defined as follows: The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including but not by way of limitation, tucking shirring, smocking, hemstitching, hand rolling, fagoting, Bonnez embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schifli embroidery and laces, burnt-out laces and velvets, Swiss handmachine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems: *Provided*, That (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manufacture of covered buttons and buckles, shall not be included.

§ 530.2 Restriction of homework.

No work in the industries defined in paragraphs (d) through (j) of § 530.1 shall be done in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate issued and in effect pursuant to this part has been

obtained for each homeworker or unless the homeworker is so engaged under the supervision of a Sheltered Workshop, as defined in § 525.1 of this chapter.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28470, June 30, 1978]

§ 530.3 Application on official forms.

Certificates authorizing the employment of industrial homeworkers in the industries defined in § 530.1 may be issued on the following terms and conditions upon application therefore on forms provided by the Wage and Hour Division. Such forms shall be signed by both the homeworker and the employer.

§ 530.4 Terms and conditions for the issuance of certificates.

(a) Upon application by the homeworker and the employer on forms provided by the Wage and Hour Division, certificates may be issued to the applicant employer authorizing the employment of a particular worker in industrial homework in a particular industry, provided that the application is in proper form and sets forth facts showing that the worker:

(1) (i) Is unable to adjust to factory work because of age or physical or mental disability; or

(ii) Is unable to leave home because the worker's presence is required to care for an invalid in the home; and

(2) (i) Was engaged in industrial homework in the particular industry for which the certificate is applied, as such industry is defined in § 530.1, prior to: (*a*) April 4, 1942, in the button and buckle manufacturing industry; (*b*) November 2, 1942, in the embroideries industry; (*c*) April 1, 1941, in the gloves and mittens industry; (*d*) October 7, 1942, in the hand-

kerchief manufacturing industry; (e) July 1, 1941, in the jewelry manufacturing industry; (f) August 20, 1941, in the knitted outerwear industry; or (g) March 5, 1942, in the women's apparel industry, except that if this requirement shall result in unusual hardship to the individual homeworker it shall not be applied; or

(ii) Is engaged in industrial homework under the supervision of a State Vocational Rehabilitation Agency.

(b) No homeworker shall perform industrial homework for more than one employer in the same industry, but homework employment in one industry shall not be a bar to the issuance of certificates for other industries.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[24 FR 729, Feb. 3, 1959, as amended at 43 FR 28470, June 30, 1978]

§ 530.5 Investigation.

An investigation may be ordered in any case to obtain additional data or facts. A medical examination of the worker or invalid may be ordered or a certification of facts concerning eligibility for the certificate by designated officers of the State or Federal Government may be required.

§ 530.6 Termination of certificates.

(a) A certificate shall be valid under the terms set forth in the certificate for a period to be designated by the Administrator or his authorized representative. Application for renewal of any certificate shall be filed in the same manner as an original application under this part.

(b) No effective certificate shall expire until action on an application for renewal shall have been finally determined, provided that such application has been properly executed in ac-

cordance with the requirements, and filed not less than 15 nor more than 30 days prior to the expiration date. A final determination means either the granting of or initial denial of the application for renewal of a certificate, or withdrawal of the application. A "properly executed" application is one which contains the complete information required on the form.

[24 FR 729, Feb. 3, 1959, as amended at 27 FR 7020, July 25, 1962]

§ 530.7 Revocation and cancellation.

Any certificate may be revoked for cause at any time. Violation of any provision of the Fair Labor Standards Act shall be sufficient grounds for revocation of all certificates issued to an employer, in which event no certificates shall be issued to the offending employer for a period of one year. Before any certificate is cancelled, however, interested parties shall be notified in writing of the facts warranting such cancellation and afforded an opportunity to demonstrate or achieve compliance.

§ 530.8 Preservation of certificates.

A copy of the certificate shall be sent to the homeworker, who shall keep such certificate on the premises on which the work is performed. A copy shall also be sent to the employer, who shall keep this copy on file in the same place at which the worker's employment records are maintained.

§ 530.9 Records and reports.

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required in the regulations in Part 516 of this chapter and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

§ 530.10 Delegation of authority to grant, deny, or cancel a certificate.

The Administrator may from time to time designate and appoint members of the Administrator's staff or State Agencies as his authorized representatives with full power and authority to grant, deny, or cancel homework certificates.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28470, June 30, 1978]

§ 530.11 Petitions for review.

Any person aggrieved by the action of an authorized representative of the Administrator in granting or denying a certificate may, within 15 days thereafter or within such additional time as the Administrator for cause shown may allow, file with the Administrator a petition for review of the action of such representative praying for such relief as is desired. Such petition for review, if duly filed, will be acted upon by the Administrator or an authorized representative of the Administrator who took no part in the proceeding being reviewed. All interested parties will be afforded an opportunity to present their views in support of or in opposition to the matters prayed for in the petition.

§ 530.12 Special provisions.

(a) *Gloves and mittens industry.* Any certificate issued to an industrial homeworker by the New York State Department of Labor under paragraph II of Home Work Order No. 4 Restricting Industrial Homework in the Glove Industry, dated June 28, 1941, will be given effect by the Administrator as a certificate permitting the employment of the homeworker under the terms of § 530.4 for the period during which such certificate shall continue in force.

(b) *Jewelry manufacturing industry.* Nothing contained in the regulations in this part shall be construed to prohibit the employment, as homeworkers, of American Indians residing on the Navajo, Pueblo, and Hopi Indian Reservations, who are engaged in producing genuine hand-fashioned jewelry on the Indian reservations mentioned, provided the employment of such homeworker is in conformity with the following conditions:

(1) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall submit in duplicate to the regional office of the Wage and Hour Division for the region in which the employer's place of business is located, on April 1, August 1, and December 1 of each year, the name and address of such employee engaged during the preceding 4-month period in making hand-fashioned jewelry on Indian reservations;

(2) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall file copies of the piece rates in duplicate with the regional office of the Wage and Hour Division for the region in which the employer's place of business is located on April 1, August 1, and December 1 of each year, and

(3) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall keep, maintain, and have available for inspection by the Administrator or the Administrator's authorized representative at any time, records and reports showing with respect to each of the homeworkers engaged in making hand-fashioned jewelry on these Indian reservations, the following information:

(i) Name of the homeworker.

(ii) Address of the homeworker.

(iii) Date of birth of the homeworker, if under 19 years of age.

(iv) Description of work performed.

(v) Amount of cash wage payments made to the homeworker for each pay period.

(vi) Date of such payment.

(vii) Schedule of piece rates paid.

These records shall be kept by each employer for each of the employer's homeworkers engaged in making hand-fashioned jewelry on Indian reservations, as provided in this section, in lieu of the records required under §§ 516.2 and 516.31 of this chapter: *Provided, however,* That nothing in this section shall relieve an employer from maintaining all other records required by Part 516 of this chapter.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

§ 530.13 Petition for amendment of regulations.

Any person wishing an amendment, addition, or revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and reasons for proposing them. If upon inspection of the petition, or upon the Administrator's own motion, the Administrator believes that reasonable cause for amendment of the rules and regulations appears, the Administrator will, unless it is impractical, unnecessary, or contrary to the public interest to do so, either schedule a hearing with due notice to interested persons or make other provisions to afford interested persons opportunity to present their views in support of or in opposition to the proposed changes.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

Wage and Hour Division

29 CFR Part 530

Employment of Homeworkers in Certain Industries

AGENCY: Wage and Hour Division, Labor.

ACTION: Notice of hearing for the purpose of obtaining information concerning employment of homeworkers.

SUMMARY: The Wage and Hour Division of the Department of Labor will be conducting hearings to determine if Regulations 29 CFR Part 530 are still appropriate to safeguard the minimum wage rate prescribed in the Act and whether there is a need to change the Regulations to more adequately reflect the current status of industrial homework.

DATES: Public hearings are to be held beginning at 9:30 a.m. on January 13, 1981 and beginning at 9:30 a.m. on February 17, 1981. Interested parties desiring to testify in person should so notify the Deputy Administrator in writing no later than December 31, 1980. Interested parties desiring to comment should submit their comments in writing to the Deputy Administrator on or before January 13, 1981.

ADDRESSES: The hearings will be held in the Raymond Contois Auditorium, City Hall, Church Street, Burlington, Vermont, on January 13, 1981 and in Conference Room N–5437 A–D, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C., on February 17, 1981. Parties desiring to testify or to submit comments should submit their requests or comments in writing to the Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: James L. Valin, Director, Division of Minimum Wage and Hour Standards, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S–3508, Washington, D.C. 20210, (202) 523–7043.

SUPPLEMENTARY INFORMATION: Section 11(d) of the Fair Labor Standards Act provides that the Secretary of Labor is "authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act." Pursuant to this authority, the Secretary has issued regulations, published as Part 530 of Title 29 of the Code of Federal Regulations. Part 530 restricts the employment of industrial homeworkers in seven industries: women's apparel; jewelry manufacturing; knitted outerwear; gloves and mittens; button and buckle manufacturing; handkerchief manufacturing; and embroideries. These industries are defined in paragraphs (d) through (j) of Section 530.1. The restrictions provide that the production of goods in these industries cannot be carried on in or about a home, apartment, tenement, or room in a residential establishment except by a certificated homeworker. An employer may obtain a certificate for workers who are unable to adjust to factory work because of age or physical or mental disability or who are unable to leave home because their presence is required to care for an invalid there. In addition, the workers must have been engaged in industrial homework in the particular industry prior to a specified date, unless this requirement results in unusual hardship to an individual homeworker, in which case the

requirement of previous employment in the industry may be waived. Individuals may also be employed as industrial homeworkers in the restricted industries under the supervision of a State vocational rehabilitation agency or a sheltered workshop without obtaining a certificate under Part 530.

The hearings are being held to obtain information on the current situation with respect to industrial homework and the extent to which it may have a bearing on the Secretary's statutory responsibility "to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed" in the Fair Labor Standards Act. Issues on which information is being sought include:

1. Whether unrestricted homework poses a significant threat to the minimum wage.

2. Whether all the industries currently restricted should remain under restriction.

3. Whether the list of restricted industries should be extended to include additional industries.

4. Whether the certificate requirements should be revised to recognize additional circumstances justifying certification, such as child care and other family demands that may tend to preclude factory employment.

5. Whether the certificate requirements should differentiate between urban and rural areas.

The comments should present factual information on these and other relevant issues. If, as a result of these hearings, it is determined that the present regulations should be amended, a specific proposal will be published in the **Federal Register.**

Copies of the Fair Labor Standards Act, Regulations Part 530 and the

Homework Handbook may be obtained by contacting James L. Valin at the address in this notice.

Interested parties desiring to testify in person should notify the Deputy Administrator in writing, furnishing the following information:

(1) The name, address and telephone number of the person(s) appearing.

(2) If appearing in a representative capacity, the person(s) appearing should provide the name(s) and address(es) of the person(s) or organization(s) being represented.

(3) The location at which the person(s) desires to testify.

(4) The length of time requested for the presentation.

(5) Where written data or comments are to be provided for the record, they should be furnished in triplicate.

Interested parties who do not desire to testify in person but who wish to submit written data, proposals or other related material for the record should provide such, in triplicate, to the Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, not later than January 13, 1981.

Persons who have not previously advised the Deputy Administrator that they wish to be heard will be heard following those who have so advised the Deputy Administrator, but they may be limited to ten minutes for their presentation.

This document was prepared under the direction and control of Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards, Wage and Hour Division, U.S. Department of Labor.

Signed at Washington, D.C., November 20, 1980.

Henry T. White, Jr.

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 530

Employment of Homeworkers in Certain Industries

AGENCY: Wage and Hour Division, ESA, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Wage and Hour Division of the Department of Labor has conducted hearings to determine if Regulations 29 CFR Part 530—Employment of Homeworkers in certain industries, are still necessary or appropriate to safeguard the minimum wage rate prescribed in the Fair Labor Standards Act and whether there is need to change the Regulations to take into account changes in economic conditions which have occurred since the homework Regulations were promulgated.

After careful consideration of the oral testimony and written comments received as a result of the hearings, as well as the information the Department has obtained independently, it is proposed that Regulations 29 CFR Part 530 be removed.

Interested persons are invited to submit written comments relevant to this proposal.

DATE: Comments should be received on or before June 4, 1961.

ADDRESS: Send written comments in duplicate to Henry T. White, Jr., Deputy Administrator, Wage and Hour Division, Employment Standards Administration, Room S–3502, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, (202) 523–8353. This is not a toll-free call.

SUPPLEMENTARY INFORMATION:

Classification:

This rule is not classified as a "major rule" under Executive Order 12291 on Federal Regulation, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, no regulatory impact analysis is required.

Furthermore, the Department believes that repeal of 29 CFR 530 will have no "significant economic impact . . . upon a substantial number of . . . small [business] entities" within the meaning of § 3(a) of the Regulatory Flexibility Act, Pub. L. No. 96–354, 91 Stat. 1164 (to be codified at 5 U.S.C. 605(b)). The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect.

This conclusion is based upon all information presently available to the Department, including the evidence submitted at four days of hearings held by the Department to obtain current information concerning the employment of homeworkers. Accordingly no initial regulatory flexibility analysis is required.

Background:

Section 11(d) of the Fair Labor Standards Act provides that the Secretary of Labor is "authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act." Pursuant to this authority, the Secretary has issued regulations, published as Part 530 of Title 29 of the Code of Federal Regulations. Part 530 restricts the employment of industrial homeworkers in seven industries: women's apparel; jewelry manufacturing; knitted outerwear; gloves and mittens; button and buckle manufacturing; handkerchief manufacturing; and embroideries. These industries are defined in paragraphs (d) through (j) of Section 530.1. The restrictions provide that the production of goods in these industries cannot be carried on in or about a home, aparatment, tenement, or room in a residential establishment except by a certificated homeworker. An employer may obtain a certificate for workers who are unable to adjust to factory work because of age or physical or mental disability or who are unable to leave home because their presence is required to care for an invalid there. In addition, the workers must have engaged in industrial homework in the particular industry prior to a specified date, unles this requirement results in unusual hardship to an individual homeworker, in which case the requirement of previous employment in the industry may be waived. Individuals may also be employed as industrial homeworkers in the restricted industries under the supervision of a State vocational rehabilitation agency or a

sheltered workshop while obtaining a certificate under Part 530.

In light of the fact that homework restrictions have been in effect for almost 40 years, the Department decided to review the current status of industrial homework. Accordingly, in the Federal Register of December 5, 1980 (45 FR 80535) the Wage and Hour Division published a notice of hearings to obtain information concerning the employment of homeworkers. The hearings were on January 13 and 14, 1981 in Burlington, Vermont and on February 17 and 18, 1981 in Washington, D.C. Written comments were submitted through March 23, 1981.

The hearings were held to obtain information on the current situation with respect to industrial homework and the extent to which the Regulations "are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed" in the Fair Labor Standards Act.

In the oral and written testimony, commenters who favored retaining the restrictions or making them more comprehensive cited a number of individual cases to establish that homeworkers were being employed at subminimum wages. Commenters opposing the restrictions contended that homeworkers in rural areas were not being exploited and that homework was the only feasible employment for them. They cited the lack of adequate transportation, the need to remain at home to care for children and other family matters as well as the lack of factory employment in most rural areas as justification of their position.

The testimony was conflicting with regard to the effectiveness of the Regulations in safeguarding the

minimum wage and raised serious questions as to the effectiveness of the Regulations in protecting workers. The Department is hopeful that this proposal will generate additional factual information. To the extent that minimum wage and overtime violations presently exist in the seven restricted industries, the Department believes that elimination of the Regulations would make it more likely that homeworkers employed in these industries would report such violations without fear of losing their employment. The Department's primary concern is the protection of workers from the illegal payment of subminimum wages, regardless of workplace, and it has embarked on a vigorous enforcement program to that end.

PART 530 [REMOVED]

Accordingly, the following action is proposed: 29 CFR 530 is removed.

The Department invites comments on this proposal particularly with respect to the following:

1. The impact of this proposal on the minimum wage provisions of the Act.

2. The impact of this proposal on the seven currently restricted industries.

3. The impact of this proposal on small businesses.

This document was prepared under the direction and control of Herbert J. Cohen, Assistant Administrator, Office of Fair Labor Standards, Wage and Hour Division, U.S. Department of Labor.

(Sec. 11, 52 Stat. 1066; (29 U.S.C. 211) unless otherwise noted; Secretary's Order No. 16–75, 40 FR 55913, December 2, 1975, and Employment Standards Order No. 78–1, 43 FR 51469, November 3, 1978)

Signed at Washington, D.C., this 29th day of April 1981.

Raymond J. Donovan,

Secretary of Labor.

Craig A. Berrington,

Deputy Assistant Secretary, Employment Standards Administration.

Regulatory Flexibility Act Certification:

I, Raymond J. Donovan, Secretary of Labor, hereby certify, pursuant to 5 U.S.C. 605(b), that the proposed repeal of 29 CFR 530, Industrial Homework regulations, will not have significant economic impact on a substantial number of small entities. This conclusion is based upon all information available to the Department, including the evidence submitted at four days of hearings held by the Department to obtain current information concerning the employment of homeworkers.

Dated: April 29, 1981.

Raymond J. Donovan,

Secretary of Labor.

[FR Doc. 81-13437 Filed 5-4-81; 8:45 am]

BILLING CODE 4510-27-M

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

29 CFR Part 530

Employment of Homeworkers in Certain Industries

AGENCY: Wage and Hour Division, ESA, Labor.

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Register Notice of December 5, 1980 (45 FR 80555), hearings were held in Burlington, Vermont and Washington, D.C. in January and February 1981 to obtain information concerning the employment of homeworkers. On May 5, 1981 (46 FR 25108) it was proposed that Regulations 29 CFR Part 530 restricting homework in seven industries be removed. Interested persons were invited to submit comments relevant to the proposal on or before June 4, 1981. Subsequently, this date was extended to July 4, 1981.

After careful consideration of the more than 10,000 written comments received as a result of the proposal, it has been decided to remove the restrictions on the employment of homeworkers in the knitted outerwear industry and to retain such restrictions in the remaining six industries.

EFFECTIVE DATE: November 9, 1981.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, (202) 523–8305. This is not a toll free number.

SUPPLEMENTARY INFORMATION:

Classification

This rule is not classified as a "major rule" under Executive Order 12291 on Federal Regulation, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, no regulatory impact analysis is required.

Furthermore, the Department believes that repeal of 29 CFR 530.1(f) will have no "significant economic impact * * * upon a substantial number of * * * small [business] entities" within the meaning of section 3(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 91 Stat. 1164 (to be codified at 5 U.S.C. 605(b)). The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect.

This conclusion is based upon all information presently available to the Department, including the evidence submitted during four days of hearings held by the Department to obtain current information concerning the employment of homeworkers and the more than 10,000 written comments received in response to the proposal. Accordingly, no regulatory flexibility analysis is required.

Background

Section 11(d) of the Fair Labor Standards Act provides that the Secretary of Labor is "authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act." Pursuant to this authority, the Secretary has issued regulations, published as Part 530 of Title 29 of the Code of Federal Regulations. Part 530 restricts the employment of industrial homeworkers in seven industries: women's apparel; jewelry manufacturing; knitted outerwear; gloves and mittens; button and buckle manufacturing; handkerchief manufacturing; and embroideries. These industries are defined in paragraphs (d) through (j) of § 530.1. The restrictions provide that the production of goods in these industries cannot be carried on in or about a home, apartment, tenement, or room in a residential establishment except by a certificated homeworker. An employer may obtain a certificate for workers who are unable to adjust to factory work because of age or physical or mental disability or who are unable to leave home because their presence is required to care for an invalid there. In addition, the workers must have engaged in industrial homework in the particular industry prior to a specified date, unless this requirement results in unusual hardship to an individual homeworker, in which case the requirement of previous employment in the industry may be waived. Individuals may also be employed as industrial homeworkers in the restricted industries under the supervision of a State vocational rehabilitation agency or a

sheltered workshop without obtaining a certificate under Part 530.

These restrictions were promulgated following a series of public hearings extending from 1941 through 1943 held with regard to seven industries (those currently restricted) in which homework was most prevalent and in which violations of the Fair Labor Standards Act had been a significant problem. The data developed at those hearings indicated that approximately 8 percent of all workers employed in these seven industries were homeworkers; however the proportion of homeworkers in knitted outerwear was in excess of 20 percent of all workers employed in that industry.

In light of the fact that the homeworker restrictions had been in effect for almost 40 years, the Department decided to review the current status of industrial homework. Accordingly, in the Federal Register of December 5, 1980 (45 FR 80555), the Department published a notice of hearings to obtain information concerning the employment of homeworkers. The hearings were held on January 13 and 14, 1981 in Burlington, Vermont and on February 17 and 18, 1981 in Washington, D.C. Written comments were submitted through March 23, 1981.

The hearings were held to obtain information on the current situation with respect to industrial homework and the extent to which the regulations are necessary to safeguard the minimum wage.

In the oral and written testimony, commenters who favored retaining the restrictions or making them more comprehensive contended, among other things, that the minimum wage and overtime requirements cannot be

properly enforced in homework, and that unrestricted homework would result in unfair competition to firms not employing homeworkers, lower wages for factory workers and a decline in factory employment in the restricted industries. Also, individual cases were cited to establish that homeworkers were being employed at subminimum wages.

Commenters opposing the restrictions cited the lack of adequate transportation, the need to remain at home to care for children and other family matters, as well as the lack of factory employment in most rural areas, as justification for removing the restrictions. These commenters further contended that homeworkers were earning more than the minimum wage.

In the Federal Register of May 5, 1981 (46 FR 25108), the Department proposed to remove Regulations 29 CFR Part 530—Employment of Homeworkers in Certain Industries—and interested persons were invited to submit written comments relevant to the proposal on or before June 4, 1981. The Department invited comments on the proposal particularly with respect to the following:

1. The impact of the proposal on the minimum wage provisions of the Act.

2. The impact of the proposal on the seven currently restricted industries.

3. The impact of the proposal on small businesses.

The period for comment was subsequently extended to July 4, 1981 (46 FR 29485).

Comments were received from more than 10,000 individuals, organizations, and agencies. The vast majority of comments did not specifically address the three areas set forth above, and expressed general support for or opposition to the proposal. While many

comments reflected concern among individuals and organizations that removal of the restrictions would result in significant harm to factory employees and employers in these industries, these comments did not present adequate substantiating evidence.

On the other hand, in the knitted outerware industry evidence was presented which showed that a continuation of the restrictions would have an adverse effect on employment opportunities, particularly in rural areas. Testimony and comments identified approximately 100 individual homeworkers in the knitted outerware industry, while the commissioner of Labor and Industry of Vermont estimated that a total of 200 to 400 persons were similarly employed in Vermont. The testimony was supported by a knitted outerware employer who also estimated that several times that number of knitted outerware homeworkers were employed nationwide. Much of this employment, the testimony and comments indicated, is in areas where public transportation is not available and few or no other gainful employment opportunities exist.

Specific support for removal of the restrictions in knitted outerware was presented in more than 1,500 comments received. While some 6,000 comments were received opposing the proposal to remove the restrictions on industrial homework in general, very few specifically addressed knitted outerwear.

While the Fair Labor Standards Act sets forth the need to safeguard the minimum wage where it is threatened by the existence of industrial homework, it also sets forth the need to eliminate "• • • labor conditions detrimental to the maintenance of the minimum standard of living necessary for health,

efficiency, and general well-being of workers * * * *without substantially curtailing employment or earning power."* (Sec. 2; emphasis added.) The available evidence demonstrates that substantial curtailment of employment opportunities and earning power will result from a continuation of the restrictions on industrial homework in the knitted outerwear industry. No such demonstration was made with regard to industrial homework in the other six industries listed in 29 CFR 530.1. In view of the above, it appears reasonable to remove the restrictions in the knitted outerwear industry only.

In conjunction with the removal of the restrictions on homework in the knitted outerwear industry, the Department will undertake a concerted compliance effort in this industry. Since it appears that homeworkers will comprise only a small percentage of the approximately 63,000 production employees in this industry, an effective enforcement program is feasible. When the restrictions were established in knitted outerwear, almost 40 years ago, effective oversight of homework in this industry was not possible as it was estimated that homeworkers constituted more than 20 percent of the workforce, the enforcement program of the Department was newly established, and acceptance of the principle of a minimum wage among covered employers was much less prevalent than at present. Should it be found that significant minimum wage or other violations of the Act are widespread among homeworkers in this industry, consideration will be given to reimposing the restrictions. Conversely, should the Department receive specific evidence supporting the removal of

restrictions in the other six industries, the Department will reexamine the issue of whether those restrictions should be lifted as well.

This document was prepared under the direction and control of Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, U.S. Department of Labor.

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No. 83-1791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LUELLA BREEN ET AL.,
Petitioners,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that employers and representatives of workers in the knitted outerwear industry had standing to challenge the Secretary of Labor's rescission of a regulation generally prohibiting homework in the knitted outerwear industry, which had been promulgated to make enforcement of the minimum wage feasible in that industry.

2. Whether the court below correctly held that the Secretary of Labor's rescission of the homework regulation was arbitrary and capricious within the meaning of the Administrative Procedure Act because:

   a. The Secretary did not consider or explain his rejection of less far-reaching alternatives that originally were suggested by the Secretary, on which there was substantial testimony and comment during rulemaking proceedings, and the adoption of which was supported by the Secretary's own explanation of the reasons for rescission.

   b. The Secretary failed to consider adequately a number of factors that were directly relevant to his determination that enforcement of the minimum wage among homeworkers would be feasible if the restriction on homework employment was rescinded.*

---

* Although they are not presented as questions in the petition, the following issues are discussed by petitioners in their argument: (1) whether the court below properly held that informal agency action to rescind a regulation is reviewable under the same standard that applies to informal agency rulemaking generally, and (2) whether the court below correctly held that the rescission was arbitrary and capricious because, notwithstanding the Secretary's stated purpose to increase employment opportunities in the knitted outerwear industry, the Secretary failed to consider the net effect of rescission on overall employment opportunities in that industry.

PARTIES BELOW

Plaintiffs/Appellants (Respondents on this Brief in Opposition):

International Ladies' Garment Workers' Union

Donald Vial, as Director of Industrial Relations of the State of California

Patrick W. Henning, as Labor Commissioner and Chief of the Division of Labor Standards Enforcement of the State of California

Lillian Roberts, as Industrial Commissioner of the State of New York

Amalgamated Clothing and Textile Workers Union, AFL-CIO

Dalton Industries, Inc.

Dalton Industries has no parent corporation or affiliates, and has three subsidiaries: Columbus Shirt Company; Dalton Sales Corporation, and Dalton Imports, Inc.

Knitgoods Workers' Union, Local 155, I.L.G.W.U.

Knitgoods Workers' Union, Local 190, I.L.G.W.U.

Knitted Outerwear Manufacturers Association, Pennsylvania District

Myer Manufacturing, Inc.

Myer Manufacturing has no parent corporation, subsidiaries, or affiliates.

United Knitwear Manufacturers League, Inc.

The League has no parent corporation, subsidiaries, or affiliates.

Defendants/Appellees:

Raymond J. Donovan, as Secretary of Labor of the United States

William M. Otter, as Administrator of the Wage and Hour Division of the United States Department of Labor

Intervening Defendants/Appellees:

Stowe Woolens, Ltd.

Luella Breen

Cecile Duffany

Linda Guetti

Mary Hon

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IN THE

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No. 83-1791

LUELLA BREEN ET AL.,
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INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL. IN OPPOSITION

Respondents International Ladies' Garment Workers' Union *et al.* (ILGWU)[1] respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

Petitioners seek review of a decision of the United States Court of Appeals for the District of Columbia Circuit setting aside the Secretary of Labor's rescission of a regulation that, since 1942, had restricted industrial homework in the knitted outerwear industry to ensure

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[1] Respondents on this Brief in Opposition were plaintiffs in the district court and appellants in the court of appeals. See *supra* p. ii.

adequate enforcement of the minimum wage pursuant to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.* The court below held that the rescission was arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A).

Background

The history of the homework restriction is described in the opinion of the court of appeals, Pet. App. 3-14, and summarized only briefly here. Four years after the enactment of the FLSA to ensure "maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. § 202(a), the Administrator of the Wage and Hour Division of the Department of Labor promulgated a minimum wage order that generally prohibited homework in the knitted outerwear industry.[2] The order, which the Administrator had concluded after extensive hearings was necessary to safeguard the minimum wage rate prescribed for the industry, became effective on April 20, 1942. For almost forty years thereafter, the homework restriction remained in effect in the knitted outerwear industry. See 29 C.F.R. Part 530, Pet. App. 146-56.[3]

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[2] The Administrator promulgated like orders for six other industries: embroideries, jewelry, women's apparel, gloves and mittens, button and buckle, and handkerchief. See *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 247 n. 5 (1945).

[3] The Administrator's authority to prohibit homework pursuant to § 8(f) of the FLSA, 29 U.S.C. § 208(f), was upheld by this Court in 1945. *Gemsco Inc.* v. *Walling, supra.* In 1949, Congress added a new § 11(d) to the Act, which declared that "all existing regulations or orders of the Administrator relating to industrial homework" were "continued in full force and effect" and expressly authorized the Administrator to adopt "such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act * * *." 63 Stat. 916-17, 29 U.S.C. § 211(d).

Administrative Proceedings

On December 5, 1980, the Wage and Hour Division published a notice of hearings "to obtain information on the current situation with respect to industrial homework and the extent to which it may have a bearing on the Secretary's statutory responsibility 'to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed' in the Fair Labor Standards Act." 45 Fed. Reg. 80,555, Pet. App. 157, 159. Information was specifically requested on five issues, including "[w]hether the certificate requirements [for exemption from the homework prohibition] should be revised to recognize additional circumstances justifying certification * * *" and "[w]hether the certificate requirements should differentiate between urban and rural areas." Pet. App. 159. Hearings were conducted in January and February 1981.

On May 5, 1981, the Wage and Hour Division published a notice of proposed rulemaking, stating that "[a]fter careful consideration of the oral testimony and written comments received as a result of the hearings, as well as information the Department has obtained independently, it is proposed that Regulations 29 CFR Part 530 [restricting homework] be removed." 46 Fed. Reg. 25,108, Pet. App. 161. The notice stated further, among other things, that the testimony received at the hearings had been "conflicting" regarding the "effectiveness of the Regulations in safeguarding the minimum wage * * *." Pet. App. 164-65.

In response to the notice of proposed rulemaking, over 10,000 comments were submitted. Well over half of these opposed the proposed rule. On October 9, 1981, the Secretary published a final rule that rescinded the homework restriction in the knitted outerwear industry as of November 9, 1981. 46 Fed. Reg. 50,348, Pet. App. 167.

Proceedings Below

Respondents ILGWU *et al.* brought suit on October 27, 1981, principally alleging that the rescission of the restriction on homework in the knitted outerwear industry was arbitrary and capricious within the meaning of the APA, 5 U.S.C. § 706(2)(A), and that it was not accompanied by an adequate statement of basis and purpose, as required by 5 U.S.C. § 553(c). In an unpublished opinion, the district court upheld the rescission on the parties' cross-motions for summary judgment. See Pet. App. 67-103. The court of appeals affirmed the district court's determination that the ILGWU *et al.* had standing to challenge the rescission, Pet. App. 16-30, and reversed on the merits, holding that the rescission was arbitrary and capricious for several reasons: Principally, the Secretary failed to consider or explain his rejection of several alternatives to total rescission that originally were raised in the notice of hearing. Pet. App. 37-43. In addition, the Secretary did not make a reasoned determination that enforcement of the minimum wage was feasible among knitted outerwear homeworkers if the restriction was lifted, Pet. App. 43-60, and the Secretary failed to consider whether rescission would curtail employment opportunities in the knitted outerwear industry generally, despite his conceded purpose to increase employment in the industry, Pet. App. 60-64.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contrary to petitioners' claims, the questions presented in this case were correctly decided by the court of appeals and are of limited significance. The Secretary of Labor, who promulgated the rule at issue, elected not to seek review in this Court. Instead, he commenced a new rulemaking proceeding, 49 Fed. Reg. 11,786 (Mar. 27, 1984), in which the comment period has already closed.

In any event, petitioners do not present any substantial questions that warrant review by this Court. *First,*

both courts below agreed, on the basis of established precedents of this Court, that plaintiffs ILGWU *et al.* had standing to challenge the rescission, because their alleged injury was directly attributable to the Secretary's action and they were within the zone of interests protected by the FLSA. Petitioners' argument to the contrary does not withstand analysis and does not demonstrate a conflict in the circuits. *Second*, the court of appeals' determination that the rescission was arbitrary and capricious was based in significant part on the principles of review and reasoned decisionmaking articulated by this Court's decision last Term in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 51 U.S.L.W. 4953 (U.S. June 24, 1983), as well as on other established precedents. Essentially, the court of appeals held that the Secretary had "failed to consider[] important aspect[s] of the problem," *id.* at 4956, and had not shown a "rational connection between the facts found and the choice made," *id.*, quoting *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). See Pet. App. 42-43, 58-60, 63. The court's judgment was correct, as we show below, and does not merit further review.

ARGUMENT

I. THERE IS NO SUBSTANTIAL QUESTION PRESENTED AS TO PLAINTIFFS' STANDING.

Petitioners contend that plaintiffs lacked standing to challenge the Secretary's decision to rescind the ban on homework in the knitted outerwear industry on two grounds: (1) plaintiffs failed to demonstrate the necessary connection between the Secretary's rulemaking and the alleged injury to plaintiffs, Pet. 23-29; and (2) the alleged injury does not lie within the "zone of interests" intended to be protected by the FLSA, Pet. 29-32. On each ground, petitioners fail to demonstrate that the decision of the court of appeals, affirming the district court on this point, was incorrect or that the decision conflicts with those of other courts of appeals or of this Court.

A. The Courts Below Properly Found Sufficient Connection Between Plaintiffs' Alleged Injury and the Secretary's Challenged Action.

In arguing that plaintiffs failed "to demonstrate the necessary connection between the Defendant and the alleged injury," Pet. 23-29, petitioners rely on *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976), where this Court said: "[A] federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant[s], and not injury that results from the independent action of some third party not before the court." Petitioners argue that the "direct result of the removal of the prohibition on homework by the Secretary is *not* payment of subminimum wages, but rather employment of homeworkers," Pet. 26, and that it is "only the independent and illegal action of third parties—homeworker employers who may choose to violate the FLSA—which will result in subminimum wage payments," *id.* (footnote omitted). But the court below applied the principle of the *Simon* decision, and petitioners' contention that it did not ignores

the entire basis of plaintiffs' challenge to the Secretary's action.

The court of appeals, after quoting the language from *Simon* on which petitioners rely, Pet. App. 26, stated:

> "The appellants allege that unfair competition (*i.e.*, payment of subminimum wages) from homeworker employers will injure factory employers paying lawful wages and the resulting pressures to lay off workers and reduce wages will injure factory employees. * * * The alleged injuries can be redressed by controlling the source of the unfair competition (*i.e.*, restricting employment of homeworkers) * * *.
>
> "* * * [T]he relief sought by appellants would make the injurious conduct of third parties complained of in this case illegal; only by taking extraordinary measures—*i.e.*, violating the law or starting new businesses overseas—could third parties prevent redress of the appellants' injuries." Pet. App. 26-28 (footnote omitted).

Although payment of subminimum wages would have remained unlawful under the Secretary's final rule of rescission, see Pet. 24-25, the effect of striking down the rescission was to make the employment of homeworkers in the knitted outerwear industry unlawful at any wage rate. The basis of plaintiffs' attack on the rescission was that the Secretary would be unable to enforce the statutory ban on subminimum wages in the knitted outerwear industry without maintaining the regulatory ban on the employment of homeworkers in that industry. That attack on the Secretary's rule was substantial since it persuaded the court of appeals on the merits, and petitioners do not in any event question the premise that plaintiffs' allegations must be taken as true for the purpose of assessing standing. Since plaintiffs' position on the merits was that violations of the subminimum wage requirement in the knitted outerwear industry would increase in the absence of the regulatory ban on home-

work, the court of appeals correctly ruled that the injuries that would allegedly flow from the Secretary's rule were sufficient to give plaintiffs standing under *Simon* and other relevant decisions of this Court. Petitioners do not contend that the decision of the court of appeals conflicts with the decisions of other federal courts of appeals, and there is no reason for this Court to grant review.

B. Plaintiffs Are Within the Zone of Interests Protected by the Fair Labor Standards Act.

The court of appeals stated that there are "clear indicia" in the legislative history "that compliant employers and their employees are within the zone of interests protected by the [FLSA]." Pet. App. 25. For example, "The language and history [of the FLSA] unmistakably evidence an intent to protect all covered employees and employers from the economic consequences of subminimum wages paid to a small sector of the labor force." Pet. App. 21. The court relied on the language of § 2(a) of the Act, 29 U.S.C. § 202(a), which provides that the existence of subminimum standards "constitutes an unfair method of competition in commerce" and on a statement in the legislative history that "no employee * * * need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes." H.R. Rep. No. 2182, 75th Cong., 3d Sess. 6-7 (1938), as quoted at Pet. App. 21. The court relied in addition on the legislative history of the Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65. These amendments, the House Report stated, "would increase the level of compliance with the statute, and *would protect complying employers* from the unfair wage competition of the noncomplying employers." H.R. Rep. No. 75, 87th Cong., 1st Sess. 28 (1961), as quoted at Pet. App. 22 (emphasis by the court).

Thus, plaintiffs in this case—who included both employers and representatives of covered workers in factories and shops and who alleged in effect that they would suffer adverse "economic consequences of subminimum wages paid to a small sector of the labor force" (that is, noncomplying homeworkers)—were within the zone of interests protected by the FLSA. The part of the petition that seeks review of that issue (Pet. 29-31) is bereft of any authority indicating that the courts below may have erred. There is, in sum, no reason for this Court to grant review on the issue of standing.

II. THE COURT OF APPEALS' HOLDING THAT THE SECRETARY'S RESCISSION OF THE RESTRICTION ON HOMEWORK IN THE KNITTED OUTERWEAR INDUSTRY WAS ARBITRARY AND CAPRICIOUS IS CORRECT AND DOES NOT PRESENT A SUBSTANTIAL QUESTION WARRANTING REVIEW.

A. The Court of Appeals Applied the Proper Standard of Review.

The court below held that, since the rescission of the homework rule was the product of informal, notice-and-comment rulemaking pursuant to the APA, 5 U.S.C. § 553, the rescission was unlawful if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). Pet. App. 30. While the appellees below, including petitioners, contended that judicial review of the rescission should be especially deferential because the longstanding rule against homework in the knitted outerwear industry had not been "seriously reexamined for forty years," Pet. App. 32, the court of appeals found that the proper standard of review was established by this Court's decision in *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 51 U.S.L.W. 4953, 4956-57 (U.S. June 24, 1983): "[T]he standard of judicial review is *not* altered by the fact that the agency has

rescinded a regulation, rather than moved in some other direction." Pet. App. 31, citing *Motor Vehicle Manufacturers Association*, 51 U.S.L.W. at 4956. Accordingly, the court articulated its function, as established by numerous decisions of this Court, to " 'consider whether the decision was based on a consideration of the relevant factors,' " Pet. App. 34, quoting *Bowman Transportation Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); and "to ensure that the Secretary engaged in reasoned decisionmaking," Pet. App. 36. At the same time, the court stated, its review "is focused and restricted, and it does not permit us to substitute our judgment for that of the agency." Pet. App. 34.

Petitioners now admit that the court of appeals "correctly articulated" the applicable standard of judicial review. Pet. 33-34. They claim, however, that the court below nonetheless accorded a presumption of validity "in the evidentiary sense" to the original rule prohibiting homework and, accordingly, "held the Secretary to a far more rigorous test than that required by law." Pet. 34-35. There is no basis in the opinion below for this assertion, since the court of appeals merely set out the teaching of this Court in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973), that "[t]here is * * * at least a presumption that [Congress's] policies will be carried out best if the [agency's] settled policy is adhered to." See Pet. App. 31.[4] The

[4] The court of appeals also observed that the longstanding and consistent support of the ban on homework in the knitted outerwear industry was "a sharp contrast" to circumstances in *Motor Vehicle Manufacturers Association, supra*, where the regulation at issue had been " 'imposed, amended, rescinded, reimposed and now rescinded again.' " Pet. App. 33. See also *id.* at 32 n. 30 (homework rule in effect almost forty years, but motor vehicle standard, promulgated four years prior to rescission, had never taken effect). These remarks by the court below do not, however, support petitioners' contention that the court applied "heightened scrutiny," Pet. 35, or an evidentiary-type presumption of validity, *id.*, to the rescis-

court did not suggest, either expressly or by implication, that the presumption should override a change in policy supported by the rulemaking record, as petitioners suggest.

Thus, petitioners' claim in this regard appears to be the same as their further claims, discussed below, that the court of appeals erred in ruling that the rescission was arbitrary and capricious. If that is so, then the asserted "presumption of validity" does not present a separate question warranting review by this Court. Even if petitioners' contention about the standard of review is different from their remaining contentions, however, it is no more than a recasting of their contention in the courts below—not pressed in the petition—that judicial review of the Secretary's rescission of an existing regulation should be more deferential than ordinary review of a new regulation. That argument was rejected by this Court, as the court of appeals recognized, Pet. App. 30-33, in *Motor Vehicle Manufacturers Association, supra.*

Elsewhere in their argument, petitioners suggest that the standard of review applied by the court of appeals in this case is in conflict with the standard of other circuits, because it is "far more intrusive." Pet. 52. The suggested conflict, however, is illusory. The Second Circuit and the Fifth Circuit, in the cases cited by petitioners, merely reiterated the well-established principle that the APA does not require that an agency's explanation of informal rulemaking be perfect or perfectly detailed, but only that the statement of reasons be sufficient to permit meaningful judicial review. *Alabama Association of Insurance Agents* v. *Board of Governors*, 533 F.2d 224, 236 (5th Cir. 1976), *vacated in part on other grounds*, 558

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sion of the ban on homework. Instead, they were made in explanation of the court's ruling that the standard of review enunciated in *Motor Vehicle Manufacturers Association*, rather than the extremely deferential review advocated by the Secretary, necessarily applied to the rescission.

F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *National Nutritional Foods Association* v. *Weinberger*, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975). This is the same principle announced and applied by this Court in *Motor Vehicle Manufacturers Association*, *supra*, 51 U.S.L.W. at 4956, and by the court below, Pet. App. 33-34.

B. The Court of Appeals' Holding That the Secretary's Failure to Consider Certain Known Alternatives to Rescission Was Arbitrary and Capricious Is Based on Established Precedent and Does Not Present a Substantial Question.

The court of appeals' "primary basis" for setting aside the rescission of the homework prohibition was the Secretary's failure to consider and explain his rejection of certain alternatives to complete rescission that were mentioned in the December 1980 notice of hearing. Pet. App. 33.[5] See Pet. App. 159. There, the Secretary inquired "[w]hether the certificate requirements should be revised to recognize additional circumstances justifying certification, such as child care and other family demands that may tend to preclude factory employment," and "[w]hether the certificate requirements should differentiate between urban and rural areas." *Id.* As the court of appeals explained, the hearings elicited significant testimony about these options. Pet. App. 37-38. The Secretary, however, did not mention these options again, either in the notice of proposed rulemaking, Pet. App. 161, or in the basis and purpose statement accompanying the final rule, Pet. App. 167. Especially in view of the Secretary's stated reasons for rescinding the homework rule in the knitted outerwear industry, which related almost

[5] The court held that the Secretary's action in this regard was arbitrary and capricious, in violation of 5 U.S.C. § 706(2)(A), and, alternatively, offended 5 U.S.C. § 553(c), which requires an adequate statement of basis and purpose.

exclusively to the curtailment of employment opportunities in rural areas,[6] the court below found that the rescission was unreasoned, because a less far-reaching rule might have addressed the Secretary's stated concerns equally well. Pet. App. 39 & n.39. The court also noted that, in view of the uncertainties in the record about the Secretary's ability to enforce the minimum wage among homeworkers in the knitted outerwear industry, particularly in urban areas, see *infra* page 16, the Secretary should have considered a rural-only alternative. *Id.* at n.39.

Thus, the court below concluded that the Secretary's explanation "could not justify [his] drastic decision to rescind rather than modify" the homework rule. Pet. App. 40. This holding was based, in part, on the decision in *Motor Vehicle Manufacturers Association, supra*, in which this Court found that the Secretary of Transportation's explanation of his decision to rescind an automotive passive restraint requirement in its entirety did not support rescission but only modification of the requirement to meet the problems identified by the Secretary. 51 U.S.L.W. at 4958, 4960.[7]

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[6] The court explained:

> "In summarizing the evidence supporting rescission [the Secretary] said that commentators 'cited the lack of adequate transportation, the need to remain at home to care for children and other family matters, as well as the lack of factory employment in most rural areas.' [Pet. App. 171]. He also indicated that 'evidence was presented which showed that a continuation of the restrictions would have an adverse effect on employment opportunities, particularly in rural areas. * * * Much of this employment, the testimony and comments indicated, is in areas where public transportation is not available and few or no other gainful employment opportunities exist.' [Pet. App. 172]." Pet. App. 38-39.

[7] *Amicus curiae* Center on National Labor Policy, Inc., contends in this regard that *Motor Vehicle Manufacturers Association* is inapposite because that case involved a statute that, unlike the

Petitioners contend that the ruling on the issue of alternatives encompasses two significant errors that warrant review by this Court. Pet. 48-49. First, they claim that the court of appeals required a far more extensive analysis of alternatives than is authorized by the APA. As described above, however, the court of appeals focussed on the alternatives to complete rescission that originally were suggested by the Secretary himself, on which there was substantial testimony and comment during the rulemaking proceedings, and the adoption of which was supported by the Secretary's own explanation of his final rule rescinding the homework prohibition. The court of appeals specifically held that:

> "the Secretary should have considered and explained why *the proposals mentioned in his notice of hearing* were inconsistent with the balance he sought between maximizing employment and effective enforcement of the minimum wage." Pet. App. 42 (emphasis added).

Second, petitioners contend that the court's ruling on the issue of alternatives depends on a misconstruction of § 11(d) of the FLSA, 29 U.S.C. § 211(d). But § 11(d) authorizes any degree of restriction that the Secretary reasonably determines is necessary or appropriate to enforce the minimum wage, and so potentially encompasses the alternatives discussed by the court of appeals. The court of appeals required consideration of certain alternatives in conjunction with its determination that the Secretary had not made a reasoned decision about enforcement feasibility. See Pet. App. 39 n.39. Accordingly, there is no basis for petitioners' dramatic assertion that "[i]t is now * * * the unlikely law of the District of Columbia that an agency may not rescind a regulation which has reasonably been found *not* to further the statu-

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FLSA, "mandated consideration of certain alternatives before rescinding a regulation." Brief of *Amicus Curiae*, Part IV-A. The Center cites no authority for this proposition, and, in any event, this Court did not rely on such a statutory requirement in *Motor Vehicle Manufacturers Association.*

tory purpose, without first considering narrower versions of the unsuitable rule," Pet. 51.

In sum, petitioners have failed to show that the ruling of the court of appeals that the Secretary should have considered certain alternatives to rescission of the extant homework rule is incorrect or in conflict with decisions of this Court.

C. The Court of Appeals' Holding That the Secretary's Determination That Enforcement of the Minimum Wage Would Be Feasible Without Restricting Homework Was Unreasoned Does Not Present a Substantial Question.

Although the purpose of the restrictions on homework in the knitted outerwear and six other industries was to make possible the enforcement of the minimum wage and other fair labor standards in those industries, see *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 250-51 (1945), the Secretary's explanation for his rescission of the rule in the knitted outerwear industry included little discussion of enforcement feasibility. He stated that "[s]ince it appears that homeworkers will comprise only a small percentage of the * * * production employees in this industry, an effective enforcement program is feasible." Pet. App. 173. He also asserted that conditions had changed since 1942 because (1) in 1942, approximately twenty percent of all knitted outerwear employees were homeworkers; (2) the Department of Labor's enforcement program was then newly established; and (3) "acceptance of the principle of a minimum wage among covered employers was much less prevalent than at present." *Id.* The Secretary offered no further explanation of his determination that the homework restriction was no longer necessary for enforcement of the minimum wage in the knitted outerwear industry.

Upon review of the administrative record, the court of appeals found that the evidence supporting the Secre-

tary's determination was "minimal," Pet. App. 43, and that there was "substantial evidence" that enforcement of the minimum wage was not feasible, *id.* at 45. The evidence of infeasibility included the testimony and comments of current and former enforcement officials of the U.S. Department of Labor and of state officials performing similar functions, as well as historical evidence of conditions prior to the imposition of the restriction in 1942. *Id.* at 45-47.

Ultimately, the court concluded that the Secretary's determination was not the product of reasoned decisionmaking because he had not sufficiently considered or addressed certain factors "that may be highly relevant to the Department's ability to enforce the [FLSA] without homework restrictions." Pet. App. 53. These factors included the possibility that the number of homeknitters would increase substantially if the restriction was rescinded, particularly in view of the Secretary's stated purpose to increase employment opportunities, Pet. App. 53-54; the record evidence suggesting that enforcement problems would be materially different in rural and urban areas, Pet. App. 55; and the characteristics of homework in the knitted outerwear industry, first identified by the Department in 1942 and subsequently analyzed by testimony and comments in the rulemaking record, that might present continuing impediments to effective enforcement of the minimum wage, Pet. App. 57.

Petitioners contend that, in reviewing the Secretary's determination of enforcement feasibility, the court of appeals substituted its own judgment for that of the Secretary and "intruded * * * into an area properly left to an agency's expertise." Pet. 45-46. Their argument in this regard, however, is primarily that the court of appeals misapplied the governing principles of law to the agency record before it, see Pet. 42-45 (alleging and discussing "substantial evidence supporting the Secretary's conclusion"), and does not present a substantial question warranting review by this Court.

Petitioners also claim that the court below essentially required the Secretary to disprove the 1942 findings on which the homework restriction was based, in order to defeat what the petitioners assert to be an evidentiary-type presumption of the validity of the homework rule. See *supra* page 10. The court did not, however, demand such empirical evidence. Instead, it noted that the earlier findings "identified numerous obstacles to previous enforcement efforts when homeworkers are used and explained that these are *intrinsic* features of homeworker employment." Pet. App. 57 (emphasis by the court). It stated that testimony and analysis in the comments in the 1981 rulemaking record "suggest[ed] that the enforcement problems created by homework continue today." *Id.* at 46. Finally, it concluded that the identified obstacles to enforcement were a relevant factor to which the Secretary had failed to give adequate consideration. *Id.* at 60.

The decision of the court of appeals is consistent with *Motor Vehicle Manufacturers Association, supra.* This Court held that, in rescinding the passive restraint requirement, the Secretary of Transportation did not make a reasoned decision about the safety benefits of automatic seatbelts, and explained that this "is a matter for the agency to decide, but it must bring its expertise to bear on the question." 51 U.S.L.W. at 4959. Similarly, the court below stated that "[i]n evaluating these considerations [of impediments to enforcement of the minimum wage], we respect the Secretary's expertise in ascertaining the enforcement capacity of his staff," Pet. App. at 58-59 n.69, and ruled only that the Secretary was required to use his expertise to evaluate the feasibility of enforcement of the minimum wage in the absence of the homework prohibition. The court's decision that the Secretary failed to do so is not in conflict with the decisions of this Court, and does not present a substantial question warranting review.

D. The Court of Appeals Correctly Held That the Secretary's Failure to Consider the Possible Curtailment of Employment in the Knitted Outerwear Industry As a Result of Rescission Was Arbitrary And Capricious.

The court of appeals also ruled that the Secretary's rescission of the homework restriction in the knitted outerwear industry was arbitrary and capricious because he did not adequately consider the effect of rescission on employment in the industry generally, even though his action "was significantly motivated by his finding that substantial curtailment of employment opportunities would result from continued restrictions in the knitted outerwear industry * * *." Pet. App. 60. See also Pet. App. 172-73 ("The available evidence demonstrates that substantial curtailment of employment opportunities and earning power will result from a continuation of the restrictions * * *."). During the rulemaking proceeding, commenters indicated that one likely result of rescission would be the reduction of employment and earnings of factory workers in the restricted industries and that some manufacturers might be forced out of business. Pet. App. 62 nn. 72-73 (citing comments). The Secretary's explanation of the rescission, however, addressed only the adverse employment consequences of the homework rule for homeknitters. The court of appeals therefore concluded that the Secretary had not given sufficient consideration to the net effect of the rescission on employment and earnings in the knitted outerwear industry. Especially in view of the Secretary's conceded concern about the employment consequences of the homework rule, this holding plainly is correct.[8]

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[8] The Secretary did not take issue in the court of appeals with the ILGWU's contentions that the rescission was based on the Secretary's concern to increase employment opportunities or that he consequently was required to consider the employment benefits and detriments of rescission. Pet. App. 62.

Petitioners contend, however, that the court's ruling "imposes on the Secretary a requirement nowhere present in the FLSA," to restrict homework "for the purpose of maximizing employment opportunity in the knitted outerwear industry." Pet. 55, 61. They argue that as long as factory workers receive the minimum wage, the Secretary is not statutorily authorized to consider the employment opportunities and earning power of these workers.

Despite petitioners' attempt to characterize the court's ruling as a misconstruction of the FLSA, it is readily apparent that the court based its decision exclusively on the requirement of the APA that the Secretary provide a reasoned explanation for his action. See *Motor Vehicle Manufacturers Association, supra*, 51 U.S.L.W. at 4956. As discussed above, the Secretary's desire to increase employment opportunities was a major purpose of the rescission, and it was the Secretary's emphasis on the curtailment of employment opportunity in the knitted outerwear industry that brought that issue before the court of appeals. The court did not suggest, contrary to petitioners' claims, that the FLSA required the Secretary to maximize employment or wages in the industry. The court merely held that the Secretary could not rationally rescind the homework rule for the stated purpose of promoting employment in the knitted outerwear industry when he had not considered whether the net effect of rescission might be to decrease employment in that industry.

Accordingly, the court of appeals' decision that the Secretary's failure to consider the possible curtailment of employment throughout the knitted outerwear industry was arbitrary and capricious is correct, and does not present a substantial question warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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NO. 83-1791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LUELLA BREEN, et. al.,

Petitioners,

v.

INTERNATIONAL LADIES' GARMENT WORKERS UNION, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTEREST OF AMICUS

The Center on National Labor Policy, pursuant to Rule 36 of this Court's Rules, respectfully submits its brief *amicus curiae* in support of the petition of Luella Breen. Consent to

file this brief was sought and obtained from all the parties involved.

The Center on National Labor Policy is a national, nonprofit organization chartered as a public-interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the adverse impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers.

The Center urges this Court to grant the petition and to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit in *ILGWU v. Donovan,* 722 F.2d 795 (D.C. Cir. 1983).

Center attorneys have represented homeknitters in collateral litigation who, like petitioners, have been detrimentally affected by the court of appeals' decision. Furthermore, Center attorneys have represented workers engaged in various forms of other homework which, in the same manner as knitted outerwear, is also prohibited. Therefore, in attempting to secure the right of all homeworkers to carry on their livelihood, the Center can represent other vital interests in having the decision of the court below reversed by this Court.

Petitioner has primarily focused on important issues of standing and judicial review of agency decisionmaking. In addition to supplementing petitioners' arguments, the Center has separately discussed why recent events have not mooted this case. Therefore, the Center can assist this Court's full consideration of all the issues presented by the instant petition.

II. ISSUE PRESENTED

Whether the court of appeals erred in finding the Secretary of Labor's decision to rescind a forty year old regulation pro-

hibiting knitted outerwear homework violated the Administrative Procedure Act and the Fair Labor Standards Act and required the consideration of other alternative courses of action short of rescission of that regulation.

III. INTRODUCTION

Petitioners Luella Breen, Cecile Duffany, Linda Guetti, and Mary Hon are individuals who work in their homes knitting ski hats and sweaters. They are among approximately 1,000 of this country's 63,000 people employed in the knitted outerwear industry who perform their work at home rather than in a factory.

In 1980, petitioners became aware of a Labor Department regulation which prohibited homework in their knitted outerwear craft. *See* 29 C.F.R. Part 530. When it became apparent that the Department was going to enforce the regulation against them, petitioners sought representation to challenge the constitutionality of the regulation.

At approximately the same time, the Department announced its intention to reexamine the status of homework, and in January and February 1981, it held hearings to determine whether homework restrictions, which had been in effect for almost forty years, were still necessary. Following the hearings, in which the testimony raised doubts over the effectiveness of the homework restrictions' purpose of safeguarding the federal minimum wage, Secretary Donovan in May 1981, proposed to lift the homework restriction on knitted outerwear and those affecting six other crafts.

Citing the testimony and letters received during a comment period following the proposed rule which demonstrated that the restriction was causing economic hardship among the

homeknitting community, as well as evidence highlighting the futility of the homework prohibition as an effective measure of enforcing the minimum wage, the Department issued a final rule in October 1981 lifting only the knitted outerwear restriction. Because of the absence of testimony or evidence regarding similar problems in the other six restricted homework occupations, Secretary Donovan retained those prohibitions.

Respondent International Ladies' Garment Workers Union immediately brought an action in the United States District Court for the District of Columbia under the Administrative Procedure Act ("APA"), 5 U.S.C. § § 701 *et seq.* and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § § 201 *et seq.*, to overturn the Department's rule legalizing knitted homework.

The district court upheld the Labor Department's rescission of the homeknitting regulation. The court found that the overall record supported the Secretary's conclusion that minimum wage standards in homeknitting circles could be sustained without a blanket prohibition. The court noted that this finding was adequately premised upon such facts as the likelihood that homeworkers have been and would remain a relatively small percentage of the entire knitwear workforce and studies by the Department and Illinois Labor Department indicating that minimum wage violations in homeknitting were not so high as to justify its continued prohibition. There was also data which demonstrated that enforcement of the minimum wage was no more difficult or violations any more widespread in homeknitting than in the hundreds of other areas where homework is permitted. *See* Appendix at 93.

The primary reason which the court observed as supportive of the Department's removal of the homework ban was

evidence demonstrating that allowing homework in the knitting industry would prevent a substantial loss of employment opportunity. The court reminded respondents that the Secretary's duty to be attentive to the creation or curtailment of employment opportunities was just as compelling as his duty to prevent the circumvention or evasion of the minimum wage. Because there was concrete evidence supplied by petitioners and similarly situated homeknitters showing that a net gain in jobs could be realized by removing the restriction, coupled with only speculative evidence that the gain would be offset by a loss in factory employment, the court concluded that the Secretary properly exercised his discretion in balancing both considerations and deciding to lift the homeknitting restriction.

The court, in summarizing, found the testimony and other record evidence, the Secretary's expertise, and common sense supported his conclusion that effective enforcement was feasible without the homeknitting ban. The evidence to the contrary was only conclusory and the fact that there was no precise documentation on future enforceability was inevitable because of the longstanding illegality of homeknitting.[1] Consequently, the court rejected respondents' challenge to the removal of the prohibition.

Respondents appealed and on November 29, 1983, the United States Court of Appeals for the District of Columbia Circuit reversed the district court decision. *ILGWU v. Donovan,* 722 F.2d 795 (D.C. Cir. 1983). The court of

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[1]The court noted that the Secretary, by removing the restriction with simultaneous plans to closely supervise minimum wage enforcement in the homenitting industry, would provide that documentation. If the evidence eventually proved that enforcement was not feasible, the Secretary had promised to reinstate the restriction. *See* Appendix at 99 and 100.

appeals rejected as arbitrary and capricious the Department's conclusion that permitting knitted homework would not hamper enforcement of the minimum wage. It rejected as "unreasoned" virtually every premise articulated by the Secretary and accepted by the district court in support of his decision to remove the ban.

The court of appeals vacated the Secretary's rule lifting the homeknitting restriction and ordered the restriction to remain in effect unless modified through "reasoned decisionmaking." The court's mandate issued on February 28, 1984; as a result, petitioners, once again became trapped by immediate illegality in a livelihood they have sought to sustain for the past two years.

On March 27, 1984 the Department of Labor announced in the Federal Register a new proposed rule to lift the knitted outerwear homework restriction and provided for a comment period for interested parties to submit their view on the proposal. 49 *Fed. Reg.* 11786. Accompanying the proposal was an emergency rule that temporarily suspended the restriction on homeknitting while the rulemaking process was carried out. The effect of the emergency rule was to allow petitioners to resume work but only for a short period of time.

The emergency rule was to last only for 120 days, but respondents filed a motion in the district court contending that the emergency rule violated the mandate of the court of appeals. On May 8, 1984 the district court, after initially denying respondents request and a subsequent appeal to the court of appeals, ordered that the emergency rule be abolished. In their pleadings and arguments during these proceedings, respondents clearly implied that should a permanent rule lifting the restriction on homeknitting be reissued, they would reinstitute judicial action to overturn it. They have contended that the new evidence cited by the Secretary in the

Federal Register justifying the emergency and proposed rule is no different from that relied on by the Secretary in issuing his 1981 rule lifting the homeknitting restriction, and which the court of appeals found to be unreasoned, arbitrary, and capricious.

IV. REASONS FOR GRANTING THE PETITION

The court of appeals has held that before an agency can rescind a regulation which has been determined by that agency to be subversive to the purpose of a statute which Congress has entrusted it to enforce, the agency must positively prove to the satisfaction of the reviewing court that the premise upon which the regulation was initially promulgated *in fact* no longer exists. Furthermore, even if the agency were able to affirmatively establish that the regulation no longer achieved its intended purpose, the decision by the court below would require the agency to modify the regulation and adopt certain alternatives which *it* has deemed appropriate before complete rescission of the regulation would be sanctioned.

This unprecedented result violates explicit statutory limitations on judicial review set forth in the Administrative Procedure Act. In addition, the decision is at odds with prior rulings of this Court as well as the Fair Labor Standards Act pursuant to which the regulation at issue was promulgated.

The effect of the decision below is to require an agency to preserve a regulation in some form, despite evidence demonstrating that its impact may have grown to be harmful to more people than it benefits. Therefore, in view of the widespread consequences which the decision below has upon many individuals and the enduring controversy which the homework issue has generated, review by this Court is imperative.

A.

RESCISSION OF THE KNITTED OUTERWEAR HOMEWORK RESTRICTION WAS NOT ARBITRARY AND CAPRICIOUS BUT WAS EXPRESSLY AUTHORIZED BY THE FLSA AND IS CONSISTENT WITH DECISIONS OF THIS COURT INCLUDING THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION CASE

As the court of appeals recognized, the Department of Labor's decision to rescind the knitted outerwear homework restriction was the result of informal rulemaking conducted under §4(c) of the APA, which applies to this homework regulation pursuant to §11(d) of the Fair Labor Standards Act. The court agreed that the applicable standard of review is the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" test. *ILGWU v. Donovan,* 722 F.2d 795, 812 (D.C. Cir. 1983).

Familiar as this test is, its elements bear repeating. In the court of appeals' own words:

> review is focused and restricted and it does not permit us to substitute our judgement for that of the agency. "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " We must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement." (citations omitted).

ILGWU, 722 F.2d at 814.

The Secretary's rescission of the knitted outerwear homework regulation clearly was not arbitrary and capricious under the foregoing principles, and it therefore should have

been sustained by the court of appeals. The Secretary's explanation of reasons for rescission contained an adequate "consideration of the relevant factors"—factors Congress specified in the FLSA—and it reflects no "clear error in judgement." To the contrary, the rationale for the Secretary's decision was sensible and well-founded.

Following re-examination of the utility of the regulation restricting homework in the knitted outerwear industry, the Secretary was unable to find that in 1981 it was reasonably related to the purpose of the FLSA. The Secretary, in the final rule, set out the fundamental purpose of the FLSA which he described as "the need to safeguard the minimum wage where it is threatened by the existence of industrial homework [as well as] the need to eliminate . . . 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . *without curtailing employment or earning power.*'" *Appendix* at 172-173.

The Secretary explained that his inability to find the regulation and purpose of the Act reasonably related stemmed from "available evidence demonstrating that substantial curtailment of employment opportunities and earning power will result from continuation of the restrictions on industrial homework in the knitted outerwear industry." *Id.*, at 173. This evidence consisted of testimony and comments from approximately 100 homeknitters, an estimate by the Vermont Commissioner of Labor and Industry that 200 to 400 people were working as homeknitters in that state alone, and an estimate by a knitted outerwear employer that several times the number of Vermont homeknitters were employed nationwide. *Id.*, at 172.

The court of appeals recognized that "curtailment of employment" was a significant motivating factor behind the Secretary's decision. *ILGWU*, 722 F.2d at 826. However, it

devoted only two pages of a sixty-four page decision to this issue. In fact, curtailment of employment and earning power was the *prime* reason underlying the decision to re-examine the homeknitting regulation and ultimately to rescind it. Contrary to the court's conclusion, *Id.*, at 827, hard data did exist which confirmed the fact that the regulation was jeopardizing "existing illegal employment of homeworkers . . . [and] additional opportunities in homework." *Id.*, at 826. The Secretary therefore resolved that the FLSA would best be served by removing the restriction. This decision plainly reflected a "rational connection between the facts found and the choice made," *Id.*, at 814, and therefore was not arbitrary and capricious, without the need to even consider any other factors upon which the Secretary relied.

The court of appeals found this aspect of the Secretary's decision arbitrary and capricious because he didn't "adequately consider the *possibility* that this employment increase would be offset by economic injury to factory workers." *Id.*, at 827 (emphasis added). Petitioners have explained, however, that this "possibility" is not a "relevant factor" which required consideration. Pet. Brief at 55-63. Nevertheless, the Secretary did consider the comments raising this suggestion and in this final rule, specifically dismissed them because they weren't adequately substantiated.[2] *Appendix* at 172. The court acknowledged that the Secretary's response to these comments were accurate, *Id.*, at 827, yet proceeded to find that his failure to analyze them rendered his decision arbitrary and capricious.

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[2]Furthermore, the comments reflected the biased view of labor union officials and also the National Hand Embroidery & Novelty Mfrs. Ass'n which obviously could not have possessed authoritative information concerning circumstances within the knitted outerwear industry. *See ILGWU*, 722 F.2d at 827 nn. 72 & 73.

In light of the specific evidence that the homeknitting restriction was frustrating job opportunities in that industry contrasted to mere speculation that lifting the restriction might work injury to factory workers, there was no "clear error of judgement" regarding the Secretary's decision to rescind the restriction. For the court of appeals to have ruled the Secretary's action arbitrary and capricious for not considering these unfounded concerns demonstrates, instead, the unreasoned nature of its decision.

Despite the Secretary's reasoned consideration of the relevant factors after a reopening and de novo reexamination of the homeknitting regulation, the court of appeals' principle reason for invalidating the decision to rescind was the Secretary's failure to opt for certain identifiable alternatives before choosing complete rescission. *ILGWU,* 722 F.2d at 815. However, the FLSA does not require the Secretary to consider specific alternatives to outright rescission. Neither does the APA. The FLSA simply states, in relevant part, that the "Secretary is authorized to make such regulations and orders regulating, restricting or prohibiting industrial homework. . . ." 29 U.S.C. §211(d).

If there is a statutory limitation on the Department of Labor's power to totally rescind a regulation in favor of a more moderate alternative, it must be contained in either the FLSA or another statute. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard,* 321 U.S. 288, 309(1944). Thus, the court's ruling that the Secretary was restricted in some way from exercising his discretion to rescind the homeknitting regulation must have some basis in *enacted* legislation; it must rest on a "firsthand judicial comparison of the claimed excessive action with the perti-

nent statutory authority." *Western Union Telegraph Co. v. FCC,* 541 F.2d 346, 354 (3d Cir. 1976).[3]

Since the FLSA contains no requirement that alternatives be considered before the Secretary reaches a decision to rescind a regulation, the court of appeals was wrong to read such a requirement into the statute. Its reliance on *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.,* 103 S.Ct. 2856 (1983), for the proposition that the Secretary was compelled to consider a less "drastic" decision to rescind the regulation is misplaced. That case involved a statute nearly identical to those found in *Overton Park, Vermont Yankee,* and *Scenic Hudson Preservation,* which mandated consideration of certain alternatives before rescinding a regulation. In fact, the Safety Act at issue in *Motor Vehicle Mfrs. Ass'n* essentially prohibited rescission of the regulation therein because no remaining passive restraint standard would have remained *at all* following removal of Standard 208. This result would have been in direct defiance of the Safety Act which was enacted to *direct* the Secretary of Transportation to issue motor vehicle safety regulations to reduce traffic

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[3]In certain instances Congress has intended that an agency consider alternative courses of action before reaching a particular decision, but has *expressly* so provided. *See e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 411 (1971) (highway statutes involved therein explicitly required the Secretary to consider whether there were "feasible and prudent alternatives" to locating a highway in parkland); *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 549-555 (1977) (NEPA explicitly requires that all federal agencies include in every report of major federal action significantly affecting the quality of the human environment "a detailed statement by the responsible official on . . . alternatives to the proposed action."); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608, 614 and 617 (2d Cir. 1965) (Federal Power Act requires FPC to consider alternatives to licensing that might better protect recreational values).

injuries and deaths resulting from accidents.

The FLSA contains no comparable obligatory language requiring maintenance of the homework restrictions and under the APA there was nothing to prevent the Secretary from determining that the existing homeknitting regulation was inappropriate and should be rescinded. In fact, this "deregulation" creates the application of every other FLSA regulation, including record-keeping, minimum wage, and protection of the homeworker's right to sue.

The court of appeals should not have mandated a different procedure by insisting that "obvious" alternatives which it preferred be considered as a condition precedent to rescission. *Vermont Yankee Nuclear Power Corp. v. NRDC, supra.* The decision below casts the court in the role as a champion of existing regulations removing from the Secretary the regulatory decisionmaking power authorized him by the FLSA and APA. Such judicial intrusion into the administrative process is wholly unwarranted.

B.

PROMULGATION OF NEW NOTICE OF PROPOSED RULEMAKING TO RESCIND THE KNITTED OUTERWEAR RESTRICTION DOES NOT MOOT THIS CASE

Subsequent to the November decision of the court below, the Secretary issued a new proposed rule to lift the knitted outerwear homework regulation. 49 *Fed. Reg.* 11786 (March 27, 1984). On the same day, he issued an emergency temporary rule suspending the court imposed ban on homeknitting pending permanent rulemaking proceedings. 49 *Fed.*

Reg. 11792. This action by the Secretary, however, has not mooted the issues presented to this Court for review.

This Court has ruled that:

> a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome . . .; jurisdiction, properly acquired, may abate if the case becomes moot because:
>
> 1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and
>
> 2) . . . events have completely and irrevocably eradicated the effects of the alleged violation . . .
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Neither standard is met here.

There is absolutely no doubt that the issue of whether the Secretary violated the APA will recur; in fact, it already has. Within two days following the March 27, 1984 announcement of the proposed and emergency rule, the ILGWU returned to district court seeking a court order invalidating the emergency rule. The district court, after initially denying the relief, eventually granted the request following an appeal to the court of appeals which remanded the case back to the district court with instructions to strike the emergency rule. Throughout those proceedings, the ILGWU indicated that they have every intention of challenging the final rule removing the homeknitting regulation now being considered by the Secretary.

Furthermore, the proposed rule which the Secretary contemplates reissuing is essentially the same rule which the

court of appeals found arbitrary and capricious. Although the Secretary has sought to cure, in his new rule, what the court below believed was arbitrary and capricious in the initial rule, dictum from the recent district court opinion invalidating the emergency rule provides no assurance that it or the court of appeals will ever find the Secretary's cure satisfactory. Memorandum Opinion No. 81-2606 at 5 (D.D.C. May 8, 1984). See attached copy. It is this threat of review which eliminates any "assurance that there is no reasonable expectation" that the Secretary's final new rule will again be subjected to the same erroneous standard of review.[4]

In the projected future challenges to a final rule rescinding the knitted outerwear restriction, the respondents obviously intend to rely on the court of appeals' opinion as the benchmark to judge the legality of the Secretary's current rulemaking. Thus, rescission of the rule would not "completely and irrevocably eradicate the effects" of the court of appeals' decision.

As already shown, the recent emergency rule proceedings clearly illustrates the ILGWU's understanding of the court of appeals' decision as one of procedural and substantive significance. Their successful challenge of the rule was premised almost entirely on the court of appeals opinion. That opinion

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[4]Furthermore, if it were thought that the mere pendency of another rulemaking procedure leading to a substantially identical rule would be sufficient to remove an actual controversy, then important issues of administrative procedure would always elude review while agencies struggle repeatedly to meet APA standards, but which the court of appeals refuses to sustain. This Court has jurisdiction to deal with such situations. *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 516 (1911). *See also Moore v. Ogilvie,* 394 U.S. 814(1969) and *Nebraska Press Assn. v. Stuart,* 427 U.S. 539(1976) (situations capable of repetition yet evading review should not be dismissed as moot).

prompted the district court to further opine that any subsequent removal of the restriction again following notice, comment, and formation of a new regulation probably would not survive another challenge because of its belief that the new rule's justification will be based on evidence which the court of appeals rejected in its initial decision. Memorandum Opinion No. 81-2606 at 5(D.D.C. May 8, 1984). Although the district court is wrong regarding this point, it clearly illustrates the continuing effect the court of appeals decision will have on subsequent agency rulemaking.

This case remains a live controversy because the current rulemaking is being undertaken in light of the court of appeals' decision. The Department's rulemaking procedure has necessarily been influenced by the court. *See Carroll v. Princess Anne,* 393 U.S. 175, 178(1969) (where a lower court decision "continues to play a substantial role in the response of [government] officials," the Court's jurisdiction does not cease); *See also Mootness on Appeal in the Supreme Court,* 83 Harv. L. Rev. 1672, 1680(1970) (it may be said that the adverse effects give the challenger, who otherwise has nothing to gain, a sufficient interest in the litigation). The Department has accordingly adopted a more sweeping analysis of its decision to rescind the knitted outerwear regulation although petitioners have steadfastly maintained that the initial rule was not arbitrary and capricious. Promulgation of the new rule is as legitimate an exercise of authority as the rule in issue here. If petitioners are correct in their assertion before this Court, the Secretary's new rule will not be as open to future challenge and his initial rule will be sustained. No resolution of either issue has been settled by the recent pronouncement of new rulemaking.

In these circumstances therefore, it is quite unlikely that "the issues presented are no longer 'live' or the parties lack a

legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496(1969). Rather, the controversy in this case remains "definite and concrete touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 240-41(1937).

V.

CONCLUSION

For the reasons stated above, *amicus curiae* Center on National Labor Policy submits that this Court should grant certorari to review the decision below.

Respectfully submitted,

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May 31, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL LADIES' GARMENT WORKERS UNION, *et al.*, Plaintiffs, v. RAYMOND J. DONOVAN, *et al.*, Defendants.	Civil Action No. 81-2606

MEMORANDUM

The Court of Appeals has remanded "forthwith" plaintiffs' Motion to Compel Compliance. The remand order directed this Court, "if appropriate under the facts and circumstances of this case, [to] enforce [the] Court [of Appeals'] mandate and require appellee Secretary to comply with its terms." Order, *International Ladies' Garment Workers Union v. Donovan,* No. 82-2133 (D.C. Cir. Apr. 30, 1984). The opinion explaining the order stated that this Court is to "determine whether the 'emergency' rule promulgated by the Secretary violates the terms of our [Court of Appeals'] previous mandate." *Id.,* slip op. at 4. That mandate had declared that:

> The restriction against industrial homework shall be reinstated and remain in effect unless properly modified pursuant to 'reasoned decisionmaking' consistent with the opinion of this Court [of Appeals].

722 F.2d at 828.

The Court of Appeals' opinion of April 30 noted that this Court had previously determined that plaintiffs would prob-

ably prevail on their claim that, "in the circumstances here notice and opportunity for comment are essential for the kind of 'reasoned decisionmaking' contemplated by the Court of Appeals." Memorandum Opinion at 3 (D.D.C. Apr. 11, 1984). The Court of Appeals expressed the view that "[a]bsent facts that do not appear in the record before us, we are of the view that the District Court's tentative conclusion concerning the merits of the appellant's position is clearly correct." Slip op. at 5 (Apr. 30, 1984). The remand opinion concluded that:

> If, on remand, it remains clear to the District Court that the Secretary has violated the express terms of our mandate, the [district] court must act forthwith to enforce the mandate and require the Secretary to comply with its terms.

Id. at 5.

Immediately upon receiving the forthwith remand order, this Court scheduled a hearing for May 4, 1984. In advance of that hearing, the Court invited defendants to identify and prove any facts that were not previously in the record before the Court of Appeals that would obviate the necessity for notice and comment. Defendants have neither identified nor proven any such facts. Indeed, counsel for the defendant Secretary stated at the May 4 hearing that:

> we do not have any further evidence to proffer because we believe that the evidence shown in the preamble to the proposed rulemaking and to the emergency suspension set forth facts justifying the Secretary's action.

All of the evidence in the preamble was before the Court of Appeals when it rendered its April 30 decision.

It is the law of this case that notice and comment are requisite to "reasoned decisionmaking." There was plainly no notice and comment prior to the issuance of the "emergency"

rule. Furthermore, even if there had been notice and comment, the reasons stated by the Secretary for his failure to follow the Court of Appeals mandate have been rejected by that Court as inadequate. As the Court of Appeals' remand opinion declared with respect to justifying the "emergency" rule:

> The alleged justification advanced by the Secretary in defending his action is merely a repeat of the argument he advanced in his motion to stay this panel's decision—an argument that has already been rejected by the [C]ourt [of Appeals].

Slip. op. at 5.

The Court of Appeals' remand order contemplates an initial determination by this Court not only as to whether the emergency rule violates the mandate, but also as to whether enforcement of the mandate is "appropriate under the facts and circumstances of this case." Turning to the second issue framed by the Court of Appeals—the appropriateness of enforcing the violated mandate—the remand opinion by its terms precludes further consideration of the question plaintiffs declined to address: whether the "emergency" rule threatens them with irreparable injury. It is also apparent that the "emergency" rule is in effect, if not in form, an administrative stay of the Court of Appeals' mandate. Defendants argue that the emergency rule will only be in effect for a few weeks, and that at the end of that time a fresh, valid rule with the benefit of notice, comment, and reasoned decisionmaking will be in place. Therefore, the argument runs, it would not be appropriate to uproot homeworkers for that brief period. But, as indicated, the rationale for the "emergency" rule is not materially different from arguments the Secretary and other defendants have unsuccessfully advanced to the Court of Appeals in support of an earlier application for stay of the

mandate at issue here.[1] That previous application was based in part on the hardship which the Court of Appeals' mandate would cause to homeworkers who are so engaged in reliance on the regulations which the Court of Appeals has held to be invalid. Thus, in determining whether forthwith enforcement is appropriate, this Court should not consider whether the "emergency" rule threatens plaintiffs with irreparable injury and should give little, if any, weight to hardship threatened to homeworkers by the Court of Appeals' mandate.

As already stated, the defendant Secretary, by his counsel, has, in effect, conceded that the only reason or evidence he now has for justifying the continuation of homeworking, pending notice, comment, and formation of a new regulation, are those stated in the preamble to the "emergency" rule. Yet, the Court of Appeals has already rejected this evidence and these reasons, some of them, at least twice. It is therefore most unlikely that fresh comments and renewed decision-making will produce evidence and reasons reconciling the broad exemption for homeworking which the Secretary has espoused with effective law enforcement that are materially different from, or more persuasive than, those which the Court of Appeals has so forcefully rejected. Thus, the pendency of new rulemaking is not any assurance that in 120 days, or in some other finite period, there will be a new and valid exemption permitting homeworkers to resume the activities proscribed by the Court of Appeals' mandate.

The Secretary attempts to justify the issuance of an "emergency" rule without notice or comment by invoking the "good cause" exception to the notice and comment requirement

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[1] A defendant-intervenor unsuccessfully applied to the Chief Justice for a similar stay, presumably on the same grounds. An intervenor has since filed a petition for writ of certiorari.

under the Administrative Procedure Act, 5 U.S.C. §553(b)(B). The Secretary claims that his action meets the criteria of the good cause exception. The emergency rule was promulgated in response to a "critical situation" in which the lives and livelihood of homeworkers would be disrupted if the ban on homeworking were not suspended. In addition, the emergency rule will expire after only 120 days and was adopted simultaneously with the initiation of formal rulemaking for a final rule.

The Secretary has not met the stringent standard of review applied by this Circuit to claims of "good cause." Such exceptions "will be narrowly construed and only reluctantly countenanced." *National Federation of Federal Employees v. Devine,* 671 F.2d 607, 610 (D.C. Cir. 1982). Use of the exception is limited to emergency situations, and the courts are instructed to "closely examine" the agency's proffered rationale. *Id.* In *Devine,* an emergency was found where the agency was required to act "by events and circumstances beyond its control, which were not foreseen in time to comply with notice and comment procedures." *Id.* at 611. Here, the Secretary is faced not with unforeseen circumstances but with a decision by the Court of Appeals that his earlier action was an "abdication of his statutory responsibility." 722 F.2d at 828. Moreover, as already stated, the 120 days predicted for the term of the "emergency" rule is probably a gross underestimate of the time the "emergency" rule would have to stay in effect in order to "preserve the *status quo*" while any new rule is being perfected and reviewed. Furthermore, the "emergency" rule adopted by the Secretary was not modified in any way to conform with the Court of Appeals' decision striking down the original rule; instead, it merely reinstates that rule. *Compare American Federation of Government Employees v. Block,* 655 F.2d 1153 (D.C. Cir. 1981).

While the defendant Secretary may not be blatantly disregarding the Court of Appeals' mandate, he has failed to state the kind of acceptable good cause for delaying enforcement or to show that responsiveness to the Court of Appeals November 1983 opinion and mandate which might justify an "emergency" rule.

After considering all of the relevant "circumstances of this case," the Court concludes that the "emergency" rule violates the express terms of the Court of Appeals' mandate and that it is appropriate to vacate the "emergency" rule and to enforce the mandate of the Court of Appeals. Accordingly, the accompanying Order grants the plaintiffs' motion, and the relief they seek.[2]

Date: May 8, 1984 /s/Louis F. Oberdorfer
United States District Judge

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[2]Although the Court of Appeals' remand order was "forthwith," and the opinion states that this Court "must act forthwith," it would be imprudent in the circumstances not to give defendants a week of grace in which to apply to the Court of Appeals for a stay.

Also the accompanying order makes no provision for a bond. At the May 4 hearing, the Court, *sua sponte,* invited defendants to suggest a bond. The defendant Secretary stated that the government is not entitled to the protection of a bond. The other defendants failed to address the question.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL LADIES' GARMENT WORKERS UNION, *et al.*, Plaintiffs, v. RAYMOND J. DONOVAN, *et al.*, Defendants.	Civil Action No. 81-2606

ORDER

For reasons more fully stated in an accompanying Memorandum, it is this 8th day of May, 1984, hereby

ORDERED and ADJUDGED: that plaintiffs' Motion to Compel Compliance with this Court's Order of March 13, 1984, and the Court of Appeals' Mandate of November 29, 1983, is GRANTED; and it is further

DECLARED and ADJUDGED: that the Emergency rule issued by defendant Donovan on March 27, 1984, 49 Fed. Reg. 11792, is without good cause and invalid; and it is further

ORDERED: that the defendant Secretary shall forthwith rescind the emergency rule published at 49 Fed. Reg. 11792; and it is further

ORDERED: that 29 C.F.R. §§530.1(f) and 530.2, which together restrict industrial homework in the knitted outerwear industry, be continued in full force and effect, unless and until modified as a result of reasoned deciionmaking, after notice and comment, as prescribed by the Court of

Appeals' mandate of November 29, 1983; and it is further

ORDERED: that enforcement of this Order is STAYED until 4:00 p.m., May 15, 1984, unless otherwise ordered by the Court of Appeals.

Date: May 8, 1984 /s/Louis F. Oberdorfer
United States District Judge

Office - Supreme Court, U.S.
FILED
JUL 3 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1791

In the Supreme Court of the United States

OCTOBER TERM, 1983

LUELLA BREEN, ET AL., PETITIONERS

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

Petitioners seek review of the judgment of the court of appeals vacating a decision by the Secretary of Labor to rescind the ban on homework in the knitted outerwear industry.

1. The Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, delegates authority to the Secretary of Labor to regulate, restrict, or prohibit industrial homework as necessary or appropriate to "prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this [Act]." 29 U.S.C. 211(d). Under this authority, in the 1940's, the Secretary issued regulations restricting the employment

of industrial homeworkers in seven industries, including the knitted outerwear industry. Homework was, and continues to be, permitted in all other industries.

On May 5, 1981, the Secretary published a notice of proposed rulemaking soliciting comments on a proposal to rescind the ban on homework in all seven industries. Approximately 10,000 comments were received in response. The Secretary also conducted hearings on the proposal in Burlington, Vermont, and Washington, D.C.

Based on this administrative record, in October 1981, the Secretary rescinded the ban on homework in the knitted outerwear industry, while retaining the homework ban in the six other industries. See Pet. App. 167-174. The Secretary determined that "continuation of the restrictions would have an adverse effect on employment opportunities," particularly in rural areas where public transportation is not available and few or no other gainful employment opportunities exist. *Id.* at 172. He determined further that, although effective enforcement of the mimimum wage provisions was not possible without a homework ban 40 years ago, when homeworkers constituted more than 20% of the workforce and the concept of a minimum wage was novel and not widely accepted, an effective enforcement program is now possible. The Secretary pledged to "undertake a concerted compliance effort in this industry" and to reevaluate the homework ban on the basis of experience with minimum wage compliance under present day conditions. *Id.* at 173.

2. Upon issuance of this rule, plaintiff-respondents (the Union, several employers, and several individuals in the factory knitted outerwear industry) filed suit in the United States District Court for the District of Columbia challenging the rule. They contended that the rule was contrary to

the Fair Labor Standards Act and had been issued in violation of the Administrative Procedure Act, 5 U.S.C. 553. Petitioners (individual homeworkers and home knitting employers) intervened to support the Secretary's decision.

In July 1982, the district court upheld the rule (Pet. App. 67-103). Although the court upheld plaintiff-respondents' standing to challenge the rule, it rejected their argument on the merits that the Secretary lacked authority under the Act to rescind the homework ban. The court concluded that the rule was neither arbitrary nor capricious, and was supported by a concise, but adequate, explanation of reasons. The court also noted that the Secretary's decision to rescind the ban was experimental and that the Department would continue to study the issues raised concerning enforcement of the Act.

Plaintiff-respondents appealed. In November 1983, the court of appeals reversed the district court's judgment and vacated the Secretary's action (Pet. App. 1-65). The appellate court's decision was predicated solely on perceived inadequacies in the Secretary's explanation of the rule; the court did not question the Secretary's authority to rescind the homework ban on a proper record and with appropriate explanation. Specifically, the court held that: (1) the record failed to support sufficiently the Secretary's conclusion that he could properly enforce the Act among home knitters (*id.* at 42-60); (2) the preamble to the final rule did not adequately address alternatives to full lifting of the ban (*id.* at 37-43); and (3) the Secretary did not consider the possible detriment to employment opportunities for factory workers (*id.* at 60-64). The court ordered that the matter be remanded to the Secretary for further proceedings as appropriate.

Petitioners filed a petition for rehearing, which was denied on February 1, 1984. In March 1984, the district court remanded the matter to the Secretary for further proceedings.[1]

3. We agree with petitioners that the court of appeals erred in concluding that the Secretary's explanation for the rule permitting homework in the knitted outerwear industry was legally inadequate.[2] A ban on homework is a drastic remedy, which severely restricts employment opportunities for persons who find it difficult or inconvenient to work in a factory setting or need to care for children or other dependents at home. It has not been considered necessary in the vast majority of industries, where other forms of regulation have sufficed to enforce the minimum wage laws.

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[1]Further developments, not directly relevant to the instant petition, took place subsequent to remand. On March 27, 1984, the Secretary published for public notice and comment a proposal again to permit homework in the knitted outerwear industry. 49 Fed. Reg. 11786. Because these new rulemaking proceedings were expected to take several months, the Secretary simultaneously issued a limited 120 day emergency rule lifting the homework ban for those persons who had legally engaged in home knitting during the more than two year period of the litigation (*id.* at 11792). Plaintiff-respondents challenged this emergency rule in district court, arguing that it was inconsistent with the court of appeals' mandate. The district court treated their challenge as a request for a preliminary injunction, and denied it on April 11, 1984. Plaintiff-respondents then filed a motion to enforce the mandate in the court of appeals. That court ruled that the district court had erred in viewing their challenge as a request for a preliminary injunction, and remanded to the district court. On May 8, 1984, the district court held that the emergency rule violated the mandate. The Secretary has appealed that ruling, and the appeal is pending. On May 18, 1984, the Chief Justice denied motions by the government and the petitioners for a stay of that decision pending review by the court of appeals. The issues in that litigation are wholly separable from those raised in this petition.

[2]We also agree with petitioners that plaintiff-respondents lack standing to challenge the rule.

Whether to perpetuate the homework ban is fundamentally a question of policy, delegated to the Secretary by statute. The decision hinges on questions uniquely within the Secretary's discretion, such as allocation of enforcement resources and judgments regarding their probable effectiveness.[3] In lifting the ban, the Secretary decided to deploy more resources to the task of enforcing the minimum wage directly, rather than relying exclusively on a prophylactic rule that prohibits legal, as well as illegal, operations.

Whether to perpetuate the homework ban also involves policy judgments regarding the relative weight to be accorded ease of law enforcement on the one hand, and claims of economic liberty on the other. The Secretary made his choice, and explained it. It is not the function of courts to substitute their judgment for that of the Secretary on matters of this kind. See *Chevron U.S.A., Inc.* v. *NRDC,* No. 82-1005 (June 25, 1984), slip op. 26-28.

Nonetheless, we do not believe that review by this Court is necessary at this juncture. The Secretary has concluded that the most expeditious way of dealing with the decision

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[3]The court of appeals found that "[t]he evidence in the record [concerning feasibility of enforcement] is at best minimal" (Pet. App. 43 (footnote omitted)). But since homework has been banned in this industry for more than 40 years, it is obvious that there could be no hard evidence regarding enforceability under future, changed, conditions. The Secretary, however, is entrusted with the discretion to determine whether a homework ban is "necessary or appropriate" (29 U.S.C. 211(d)), and such determinations are entitled to substantial deference by the courts. *FCC* v. *WNCN Listeners Guild,* 450 U.S. 582, 594-595 (1981); *Building & Construction Trades' Department* v. *Donovan,* 712 F.2d 611, 629 (D.C. Cir. 1983), cert. denied, No. 83-697 (Jan. 16, 1984). The court of appeals simply substituted its judgment for that of the Secretary. (It is interesting that during the period homework was permitted in the knitted outerwear industry, the Secretary's judgment was borne out; for investigated firms, the FLSA compliance rate among homeworkers was "roughly comparable to that found in all covered industries." 49 Fed. Reg. 11794 (1984).)

below is to institute a new rulemaking that will address the issues identified by the court of appeals. The Secretary issued a new notice of proposed rulemaking on March 27, 1984, and expects to complete the rulemaking within the next two to three months. If a new rule is issued, it may well moot litigation on the previous rule. See *Center for Science in the Public Interest* v. *Regan,* 727 F.2d 1161 (D.C. Cir. 1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Solicitor of Labor
Department of Labor

JULY 1984

DOJ-1984-07